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NO. A-152

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LOIS A. FISHER,

Petitioner

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lawrence S. Schwartz*
Stephen J. Edelstein
SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
293 Eisenhower Parkway
Suite 300
Livingston, New Jersey 07039
(201) 740-1600
Attorneys for Petitioner

*Counsel of Record

5H PP

QUESTIONS PRESENTED

1. Is there a need to clarify the standards for summary judgment in "pretext" employment discrimination cases in light of the Supreme Court's holding in St. Mary's Honor Center v. Hicks, __ U.S. __, 113 S.Ct. 2742 (1993)?

2. At what point does a circuit court's affirmance without opinion of a district court decision which grossly ignores existing case law constitute a sufficient departure from the accepted and usual course of judicial proceedings so as to warrant the exercise of the Supreme Court's powers of supervision?

LIST OF ALL PARTIES

A list of all parties as required by Rule 14.1(b) is included in the caption.

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FOR THE THIRD CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this action on May 27, 1993.

OPINIONS BELOW

Summary judgment was granted in favor of the defendant by the district court, Civil Number 90-503 (D.C.N.J. August 5, 1992). The decision of the district court was affirmed without opinion, Nos. 92-5473 and 92-5497 (3rd. Cir. May 27, 1993), and a Petition for Rehearing was denied, Nos. 92-5473 and 92-5497 (3rd. Cir. July 13, 1993).

STATEMENT OF JURISDICTION

The final judgment of the court of appeals was entered on May 27, 1993. Petition for Rehearing was denied on July 13, 1993. On August 17, 1993 Justice Souter signed an order extending the time to file a petition for certiorari to and including October 22, 1993. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . ., sex, . . .;

Age Discrimination in Employment Act, 29 U.S.C. §623:

> It shall be unlawful for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

The Fair Labor Standards Act, 29 U.S.C. §206(d)(1) (The Equal Pay Act):

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within

> any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .
>
> United States Constitution,

Amendment XIV:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .
>
> New Jersey Law Against

Discrimination, N.J.S. 10:5-12:

> It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> a. For an employer, because of the . . ., age, . . ., [or] sex . . . of any individual, to refuse to hire or

> employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; . . . .

STATEMENT OF THE CASE[1]

Jurisdiction of the United States District Court for the District of New Jersey was invoked by the petitioner by the filing of her complaint on February 1, 1990 seeking damages for alleged violation of Title VII, 42 U.S.C. §2000e et seq., the A.D.E.A., 29 U.S.C. §621 et seq., the Equal Pay Act, 29 U.S.C. §206(d)(1), the due process clause of the Fourteenth Amendment, and various pendent

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[1] No trial was conducted of this matter, since the defense motion for summary judgment was granted in its entirety. Therefore, the Statement of the Case sets forth the Petitioner's factual contentions, consistent with those that were presented to the district court.

state claims. Jurisdiction was based upon 28 U.S.C. §1343; 42 U.S.C. §2000e, et seq.; 28 U.S.C. §§1391(b) and (c); and pursuant to the doctrine of pendent jurisdiction.

Dr. Lois Fisher ("Fisher") was hired by Rutgers University ("Rutgers") effective September 1, 1985 as a tenure-track Assistant Professor in the Department of Business Administration of the Faculty of Arts and Sciences--Newark ("FASN"). Her qualifications included a Ph.D., with major fields in Higher Education and Social and Organizational Psychology, received from the University of Chicago in August 1984; and a post-doctoral certificate in Business Administration from New York University, received in Summer 1985. During 1984-85, she taught part-time in the Department of Business Administration at FASN. Fisher

was born on February 22, 1932; at the time of her hire she was 53 years old. On June 15, 1988, Fisher was informed that she would not be reappointed for a second term.

Faculty employment at Rutgers is governed by written University regulations and policies and a collective bargaining agreement.

In Fisher's engagement letter, the Dean of FASN stated that University regulations required an evaluation for further reappointment in the second year of the three-year contract. Rutgers' standards for reappointing assistant professors differ from the standards utilized in granting tenure. Pursuant to Rutgers' policies, assistant professors will normally be reappointed for a second term if they have performed satisfactorily and if there is a

reasonable expectation that at the end of that period there will be an opportunity for further promotion if they are qualified.

Despite the plain language of her engagement, Rutgers unilaterally decided to consider Fisher's reappointment in March of 1988, which was the third year of her contract. Failure to evaluate Fisher in her second year was material in that she was evaluated by a much different departmental committee, and, in 1988, no department members who participated in Fisher's evaluation had a background in her specific field, which is management.

Rutgers' policy sets forth five criteria for reappointment. These are: Teaching Effectiveness, Scholarly/ Creative Activity, Research Accomplishments, Professional Activity,

and General Usefulness. The process for reappointment is also set forth in University Regulations and in annual Instructions issued thereunder. Reappointments are acted upon by the candidate's department and separately by the department chair, independently by the FASN Appointments and Promotions Committee ("A&P Committee"), by the Dean of FASN, and by the Provost of the Newark campus, in that order. The Instructions require specific ratings on each criterion and justification for the ratings--all on prescribed forms.

There were numerous procedural errors in Fisher's reappointment evaluation and substantive errors in her reappointment packet. The department's negative evaluation of Fisher rested on its assessment of the quantity and quality of Fisher's publications as

inadequate and not in "our field." These reasons were untrue in themselves and untrue when compared to the records of the younger male candidates, who were reappointed both in 1987 and 1988 at FASN and at the Graduate School of Management ("GSM") at Newark. Several of these candidates were reappointed with no publications and with nothing accepted for publication. In fact, Fisher's department rated the male departmental candidate (who was reappointed) higher than Fisher in publication, despite the fact that during his appointment period he had published only one article and had one in press, while Fisher published two--one of which was published during the evaluation process. Fisher's refereed publications and research were on management topics and accepted for presentation at the national Academy of

Management and at other refereed professional conferences.

In addition, the department reached false conclusions about the difficulty rating in student evaluations of Fisher's major course, failing to compare it with the difficulty rating of that of the previous department chair, who taught the course at the same time and received virtually identical ratings. It then grossly mischaracterized a memo that Fisher had written concerning means of helping poorly prepared students to say that Fisher thought her students, as a whole, were "very poorly prepared" and claimed to be puzzled by the supposed discrepancy.

Other instances of departmental bias include failure to mention the two peer-reviewed University Research Council grants that Fisher received for sole-

authored work, while mentioning those that the younger male candidate received for co-authored work, rating of Fisher lower than the younger male in professional activities on the basis of an equivalent narrative, and omitting Fisher's activities under General Usefulness.

In addition, Rutgers failed to follow its required procedures in evaluating Fisher. For example, the Department Chair failed to notify or convene all of the tenured faculty to participate in evaluating Fisher's reappointment packet. At the time Fisher's reappointment was considered, the Department had six tenured faculty members, but only three participated, although four were available and could have attended. One of the three was the new Department Chair, who voted with the

Department, rather than submitting a separate, independent evaluation, in direct violation of an University policy provision which explicitly prohibits such action.

The Department Chair also committed other abuses of process during Fisher's evaluation. For example, he asked Fisher for proof of certain information which he did not bother to verify with respect to the younger male candidate he evaluated and whom he claimed to have helped with his research. At the same time, he failed to ask Fisher about other items he later claimed the Department had needed.

Further, in direct violation of the Instructions, the Dean failed to fill out the required evaluation form on any of the reappointed candidates, completing it only on the two nonrecommended older, female candidates. His substitute memos

to the Provost on those recommended failed to include the required rating grid and failed to address each specific criterion on each candidate.

The departmental committee's negative recommendation was also inconsistent with Rutgers' view of Fisher up to that time. For example, just seven months before her reappointment was rejected, the Associate Dean and the prior Department Chair had recommended Fisher for an out of cycle salary increase, stating:

> She is actively engaged in a research effort. She has two articles published or accepted in refereed journals and has participated in numerous professional meetings as a presenter or discussant. We believe she is a serious prospect for eventually being tenured.

The increase, subsequently approved at all levels of the University, was granted in January 1988.

Indeed, Fisher was given no indication either before or after August of 1987 that her accomplishments were unsatisfactory, and the Dean of FASN could not recall any discussions with Fisher prior to April of 1988 in which he informed her that her scholarly activities were inadequate or that she was headed in the wrong direction.

Subsequent levels of review further poisoned the process. For example, the Dean falsely criticized Fisher's teaching performance and scholarly activity, while approving the reappointment of younger males whose research accomplishments were inferior and whose records were not entirely satisfactory. The Provost of the Newark campus, who claimed that satisfactory teaching effectiveness is a threshold element of reappointment, nonetheless approved the reappointment of

a younger male with below average ratings under teaching effectiveness criterion.

Statistical analysis indicated that Rutgers demonstrated a clear bias of favoritism towards younger male candidates. Dr. Orley Ashenfelter, Professor of Economics and Director of the Industrial Relations Section of Princeton University and the Editor of the American Economic Review, analyzed whether there is statistical evidence of discrimination in reappointments of assistant professors at FASN and at the Graduate School of Management in 1987 and 1988. Preliminary conclusions revealed that the average age of individuals who were not reappointed was higher than the average age of those who were and that the difference was unlikely to have arisen by chance. He also noted that women were less likely to be reappointed

than men, to a degree that was statistically significant.

Rutgers also treated Fisher in a discriminatory fashion in other areas. For example, Fisher's starting salary at FASN was the lowest of any tenure track assistant professor on the Newark campus who was appointed in 1985 and was lower than the salaries of younger males who did not have Ph.D. degrees and who were otherwise less qualified than she. Although she repeatedly expressed a desire to teach at GSM, her applications were consistently ignored or denied, and younger, less qualified males were eventually hired.

Fisher's attempts to utilize the contractual grievance procedure in her collective bargaining agreement were useless. Rutgers frustrated the process at every turn, delaying the approval of

Fisher's grievance statement, breaching the collective bargaining agreement by failing to file its reply within the contract limits, and by refusing to cooperate in convening a hearing panel in a timely manner, even after Fisher was removed from the payroll. More than one year after she had filed her grievance, Fisher had still received no hearing. After Fisher asserted that the grievance process was futile, Rutgers unilaterally declared the grievance withdrawn, without the approval of the grievance committee that had said it would hold matters in abeyance.

REASONS FOR GRANTING THE WRIT

I. IN THE AFTERMATH OF ST. MARY'S HONOR CENTER V. HICKS, IT IS NECESSARY FOR THE COURT TO CLARIFY THE STANDARDS FOR SUMMARY JUDGMENT IN "PRETEXT" EMPLOYMENT DISCRIMINATION CASES.

Although the 1986 summary judgment trilogy of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, 477 U.S. 242 (1986), and Matsushita Electric Industrial Corp. v. Zenith Radio, 477 U.S. 574 (1986) may have been consistent with the overall trend to pare the docket of the district courts, the expanded use of Rule 56 is not without cost, including, most importantly, the potential for the improvident loss of the constitutional or statutory right to a trial by jury.[2] In

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[2] See, Issacharoff and Loewenstein, Second Thoughts About Summary Judgment, 100 Yale L.J. 73 (1990).

employment discrimination cases, in which burdens of production have traditionally shifted[3] and standards of proof have remained unsettled, the risk of abuse is especially great. In the instant case, the district court granted a defense motion for summary judgment on all counts, despite its determination that Fisher had established a prima facie case with respect to her claims of age and sex discrimination. This Court's recent decision in St. Mary's Honor Center v. Hicks, __ U.S. __, 113 S.Ct. 2742 (1993) leaves in doubt the applicable standard for summary judgment in a "pretext" discrimination case, and the Court therefore needs to clarify (1) that the post-Hicks standard is no different from

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[3] See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

that regularly required by Rule 56; (2) that summary judgment for the defendant employer should rarely be granted once a prima facie case has been established; and (3) that, for the purposes of resisting a motion for summary judgment, evidence in support of the qualifications prong of the prima facie test and evidence of pretext may be identical. While there is textual support in Hicks for the proposition that "pretext-plus" may or may not be required for ultimate determination, it is not and should not be required to avoid the entry of summary judgment[4], recognizing that " . . . summary judgment has become the principal

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[4] For insight into the dangers of using pretext-plus as a standard for summary judgment, see Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases," 43 Hastings L.J. 59 (1991).

procedural battleground for employers seeking to avoid discrimination trials." Lanctot, 43 Hastings L.J. at 67, fn.38 (1991).[5]

In Hicks, the Court of Appeals[6] reversed a district court judgment[7] and found in favor of the plaintiff

> [b]ecause all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race. 970 F.2d at 492.

The Supreme Court, however, disagreed. Justice Scalia wrote:

> If . . . the defendant has succeeded

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[5] Citing Visser v. Packer Engineering Associates, Inc., 924 F.2d 655 (7th Cir. 1991).

[6] 970 F.2d 487 (8th Cir. 1992).

[7] 756 F. Supp. 1244 (E.D.Mo. 1991).

> in carrying its burden of production, the McDonnell Douglas framework -- with its presumptions and burdens -- is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in Burdine that to rebut the presumption "[t]he defendant need not persuade the Court that it was actually motivated by the proffered reasons." 450 U.S. at 254 [emphasis added]

Thus, once the defendant has made some "production," the ultimate question of intentional discrimination must be decided by "the trier of fact." 113 S.Ct. at 2749.

Since all employment discrimination claims are fact specific, "[o]nce a prima facie case is established either by the introduction of actual evidence or reliance on the McDonnell Douglas presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the

merits . . . ." Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985). This is consistent with Rule 56 of the Federal Rules of Civil Procedure, which mandates that summary judgment may be granted only where the moving party can show the absence of genuine issues of material fact. The role of the court at the summary judgment stage is to determine if a genuine issue of material fact exists and not to weigh the evidence presented and determine the truth of the matter. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).[8]

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[8] The prevailing rule in the Third Circuit is articulated in the traditional way. In 1992, that court, reversing the entry of summary judgment by the same district court judge who decided the instant matter, held (1) that inferences from underlying facts "must be viewed in the light most favorable to the party opposing the motion;" (2) that "the non-movant's allegations must be taken as true, and when these assertions conflict with those of the movant, the former must receive the

The decisions below raise important issues in exactly this context. Unless this Court takes the opportunity to clarify now the standards for summary judgment in employment discrimination matters, abuses will persist. Since the central fact in such cases "is not a physical occurrence, but rather . . . state of mind," 113 S.Ct. at 2754, summary judgment is particularly inappropriate once it is determined that a prima facie case has been established. This much was recognized by the district court in this case. At oral argument,

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benefit of the doubt;" that (3) summary judgment may only be granted where "there is no issue as to any material fact;" and that (4) "conflicts of credibility should not be resolved on a hearing on the motion for Summary Judgment." Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1250 (3rd Cir. 1992), reh'g denied, 958 F.2d 1271 (3d Cir. 1992).

Judge Sarokin commented:

> What always troubles me on motions for summary judgment . . . is that pretext by its very nature of the claim raises a factual issue. Pretext usually means the plaintiff is claiming that the reasons being offered in this case by the evaluators are not the true reasons, and that seems to always suggest that there is a question of fact as to whether or not the reasons given are the true reasons or not.
>
> I don't know how you can determine that when all you have are affidavits and no opportunity for cross-examination.

The district court went on to describe its decision on the motion as a "close call."

However, the district court granted summary judgment by employing a different standard:

> Because plaintiff has not identified such "glaring inconsistencies" or other evidence that defendant's doubts about her were influenced by forbidden considerations, the Court concludes that Fisher has not provided evidence of pretext to

> create a triable issue. Although she carried her prima facie case, she has failed to produce any evidence on the basis of which a reasonable jury could reject defendant's proffered legitimate reasons for not reappointing her. Accordingly, Fisher's sex and age discrimination claims based on her non-reappointment at FASN will be dismissed.[9]

The district court repeatedly resolved disputed issues of fact, assessed credibility, and generally determined that the employer's proffered "legitimate" reasons for its decision were unrebutted by engaging in an exercise that amounted to nothing less than a weighing of the evidence. Despite the Third Circuit's view that "[t]he issue of the defendant's intent at the

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[9] For a discussion of the applicability of "glaring inconsistencies," see Point II, infra. See also, Bennun v. Rutgers State University, 941 F.2d 154 (3rd Cir. 1991), cert. denied, __ U.S. __, 112 S.Ct. 956 (1992).

time of the plaintiff's discharge is clearly a factual question," Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir. 1987), the district court clearly felt justified in a method of analysis that directly parallels that of the Court of Appeals in Hicks.

This Court's opinion in Hicks makes it clear that such an analysis was improper after a full hearing; it remains an open and unresolved question if such an analysis is permissible on a motion for summary judgment.

Because of the need to resolve this open and ambiguous question, and because the decisions below present an appropriate legal and factual framework for doing so, the Court should grant certiorari.

II. BY AFFIRMING THE LOWER COURT'S RULING WITHOUT ISSUING AN OPINION, THE THIRD CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The Legal Framework

The Third Circuit has enunciated recent, clear precedent which set out the standards to be applied in employment discrimination matters. See, Bennun v. Rutgers State University, 941 F.2d 154 (3rd Cir. 1991), cert. denied, __ U.S. __ 112 S.Ct. 956 (1992) and Ezold v. Wolf, Block, Schorr and Solis - Cohen, 983 F.2d 509 (3rd Cir. 1992), rehearing denied 983 F.2d 548 (3rd Cir. 1993).[10]

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[10] Although not an employment case, for insight into the Third Circuit's current view of summary judgment see Kreimer v. Bureau of Police for Town of Morris Town, 958 F.2d 1242 (3rd Cir. 1992) rehearing

On May 27, 1993, the Third Circuit affirmed the district court's entry of summary judgment with only an order of judgment, but with no opinion. However, the district court's dismissal cannot stand in light of Bennun, and the error is so clear as to require invoking the supervisory authority of the Supreme Court.[11]

In Bennun, in a bench trial, the Court held that an associate professor at FASN at Rutgers who had been denied promotion had successfully established that the reasons proffered by Rutgers for the denial were pretextual. The district court had engaged in a comparison of

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denied 958 F.2d 1271 (3rd Cir. 1993).

[11] Fisher's complaint was filed in February 1990, several months before the District Court's decision in Bennun.

Bennun's promotion packet and credentials to those of a non-Hispanic colleague in his department who was treated differently during the promotion process. That comparison revealed that Rutgers' proffered nondiscriminatory reason for failing to promote Bennun (the "poor quality and insufficient quantity of his research") was a pretext for Rutgers' discriminatory denial of promotion. Bennun at 177.

The Third Circuit squarely rejected Rutgers' contention that the district court could not look behind the bare assertions of non-discrimination and determined that the district court had "simply found Rutgers' reason 'unworthy of credence,'" 941 F.2d at 178 [citing McDonnell Douglas], and that it was the district court which had the

responsibility for "find[ing] facts and assess[ing] credibility." 941 F.2d at 179.

In the instant case, then, the district court erred twofold. First, it improperly acted as a trier of fact and assessor of credibility at the summary judgment stage rather than at trial[12]. Second, it deviated to such an extent from the Bennun analysis of comparative criteria as to render this extremely persuasive precedent meaningless, even though the district court had determined that Fisher had established a prima facie case. The Third Circuit, affirming without opinion, implicitly endorsed all aspects of the district court's holding.

This circumstance has created such

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[12] Fisher had properly invoked her right to a jury trial.

an injustice and represents such a deviation from settled case law that the Supreme Court should exercise its supervisory authority to assure Fisher's constitutional and statutory right to a trial by jury.

B. The Failure to Compare

A comparative analysis of Fisher's credentials against those of younger, equally or less-qualified males who were reappointed,[13] reveals glaring inconsistencies which are much more extreme than those found in Bennun.[14] In

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[13] The process for reappointment is not a contest among candidates. Each candidate is to be judged on his or her own merits, and all may be reappointed if qualified.

[14] The district court compared Rutgers' treatment of Bennum to its treatment of another candidate. It analyzed, inter alia, the quality and quantity of publication, ratings of teaching

particular, Fisher established that:

- The vast majority of Assistant Professors are reappointed. Fisher's overall record was satisfactory, which, according to University policy was sufficient for reappointment.

- During the period of her appointment, Fisher had published two articles, one of which was still in galley proof at the beginning of the

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effectiveness, peer evaluation, and usefulness. 941 F.2d at 177, 178. It considered differences in the treatment of candidates at various levels of the process, such as the Appointments and Promotions Committee. 941 F.2d at 179. In fact, notwithstanding Rutgers' contention that there was no basis for comparison, since Bennum was primarily a researcher and another candidate was primarily a teacher, the district court appropriately focused on the five criteria established by Rutgers, the same five criteria on which Fisher bases her comparative argument. 941 F.2d at 179.

The Third Circuit affirmed the district court's consideration of all of these comparisons as trier of fact. Certainly, in Fisher's case, the same comparisons raised issues of fact which the district court was not permitted to resolve at the summary judgment stage.

reappointment evaluation. Since his appointment at Rutgers, also in 1985, Professor Castelino, a younger male, had published only one article. Both Rutgers and the district court failed to acknowledge Fisher's second article, even though the record showed that it was published at the time of her review.

- Both of Fisher's articles were sole-authored, and should have been given more weight than Castelino's, which were co-authored.

- Fisher's articles were refereed, and should have been given more weight than the non-refereed publications of other candidates. Bennun, supra, 941 F.2d at 175, fn.11.

- Fisher's two publications were derived from her award-winning dissertation. Both articles that Castelino published during a prior appointment were derived from his dissertation. The fact that a publication is derived from a dissertation is not a negative evaluation factor, nor has Rutgers presented any evidence that it should be negative, except for its own, self-serving assertion. In reality,

publications derived from dissertations are common and expected. After the fact, the Dean of FASN "expected more articles derived from the dissertation".

- Rutgers argued that Fisher's publications were not in the field of management, ignoring both her Candidate's Statement, which showed that these publications were, and the fact that her papers were of such a high quality that they were refereed and accepted for presentation at the Academy of Management and elsewhere.

- The department used identical language to describe Fisher and Castelino's professional activities, but rated Fisher only "average" and Castelino "above average." The Provost's after-the-fact explanation for the department's rating was that most of Fisher's professional activities did not involve management organizations, contrary to the evidence in her reappointment packet which showed that the majority were, indeed, in the area of management.

- The district court attempted to show that Rutgers had expressed a "legitimate" preference for

Castelino's activities, thereby wrongfully giving the impression that a choice had to be made between the two candidates.

- The district court acknowledged grants received by Castelino, but joined Rutgers in ignoring the fact that Fisher had also received two highly competitive grants.

- The district court failed to consider the glaring inconsistencies in the teaching evaluations of Fisher, Castelino, and others, and the department misquoted a memo written by Fisher regarding student preparation and then improperly used the misquote against her. Fisher offered evidence that this invalid criticism negatively affected the evaluations of the Dean and the Provost.

- The department failed to report Fisher's Co-Chairmanship of the Business Division's Teaching Committee.

- The court ignored the effects of the various procedural errors committed by Rutgers in evaluating Fisher and others. These procedures were required by Rutgers own regulations and

by the collective bargaining contract.

In addition, Bennun, like Fisher, had demonstrated that during his review for promotion, Rutgers had violated its own policies, particularly regarding the make-up of the committees which reviewed his credentials and voted against his promotion, 941 F.2d at 162; and the Third Circuit held in both Bennun and in Roebuck v. Drexel Univer., 852 F.2d 715 (3d Cir. 1988), that the make-up of an evaluating committee is crucial, especially in cases where evidence shows that discriminatory evaluations can infect the ultimate decision. 852 F.2d at 727. Although Fisher presented evidence that Rutgers, in evaluating her credentials, violated its own policies regarding procedure and committee make-

up, it is unclear if this evidence was considered by the Third Circuit in deciding to affirm, since there is no opinion.

It is also unclear if the Third Circuit considered Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), reh'g denied, 983 F.2d 548 (3d Cir. 1993), or, if it did, the role which it played in its decision.[15] In Ezold, the Third Circuit affirmed the comparative analysis employed in Bennun, specifically holding that "glaring inconsistencies" between Bennun and another candidate had led to the conclusion that the reason articulated by Rutgers for denying Bennun's promotion

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[15] Ezold was decided after the Fisher appeal was filed, but before it was decided.

was a pretext. The inconsistencies in Fisher's case are even more glaring than those in Bennun.

C. The District Court's Improper Resolution of Facts

But most seriously, the district court repeatedly violated Rule 56 standards by determining issues of credibility and resolving genuine questions of material fact. For example, with respect to one of Fisher's claims that Rutgers had violated its internal policies, the district court found that "defendant's interpretation of the regulation is both credible and plausible . . . ."

Other specific instances of improper fact resolution, even in the face of Petitioner's sworn statements to the

contrary, by way of deposition testimony and certified answers to interrogatories, include:

- The district court concluded at Pa27 that Fisher had failed to produce any evidence upon which a reasonable jury could reject Rutgers' proffered legitimate reasons for not reappointing her. Rutgers argued, as it had in Bennun, 941 F.2d at 179, that "with regard to both quantity and quality of publication the candidate's credentials are clearly below average." However, Fisher presented evidence that, during the period of evaluation, she published more papers than many people who were reappointed at FASN and GSM. In fact, some people who were reappointed did not produce any publications. As to quality, Fisher produced a letter from the Dean of GSM nominating her for a national award based upon the quality of her work as well as evidence that she had won the award. Fisher's articles based on her dissertation were refereed (without identity of author), objectively affirming the quality of the work that Rutgers characterized as marginal at best.

- At Pa28, the district court found that Rutgers had proffered "unrebutted" legitimate reasons for inconsistencies in its treatment of Rutgers. Contrary to those conclusions, Rutgers reasons were squarely rebutted.

- The Court credited Rutgers' after-the-fact explanation rating Fisher lower in professional activities than Castelino, based upon an affidavit of the Provost which concluded that "all but two of plaintiff's professional activities involved higher education organizations rather than management organizations." (Pa30). Contrary to this assertion, Fisher's reappointment packet demonstrated that the majority of her activities were involved with management organizations.

- Fisher's department failed to give her credit for having received any grants, leading to the erroneous conclusion that she had received none. Rutgers attempted to downplay this serious omission with subsequent affidavits asserting that Castelino's grants were of greater significance because they were based upon faculty peer review. However, Fisher's

grants were also based upon faculty peer review. The district court credited Rutgers' assertion as a critical basis for its decision, Pa30-32 despite Fisher's proof that her second grant was in competition with all university faculty, while Castelino's grants were given by the Rutgers Business Coordinating Council for a co-authored work only. Rutgers presented no documents to support its contentions.

- Fisher demonstrated that Rutgers had failed to follow its own regulations. For example, the department chair failed to present a separate evaluation statement as required by the University Promotion instructions. However, the district court determined that Rutgers' interpretation of this regulation was "credible and plausible," Pa35-36, and rejected Fisher's interpretation, notwithstanding that, under the collective bargaining agreement, even a past practice may not supersede a written regulation. Despite Fisher's demonstration that this and other procedures were not followed, the district court deemed them "minor" and

ignored them (Pa28-32).

- The district court found at Pa39 that another candidate was reappointed with "fewer published articles." In fact, that candidate had no publications and had nothing accepted for publication.

- The district court misquoted Professor Ashenfelter's conclusions and discarded them without a hearing to assess his explanation of the statistics. Professor Ashenfelter's opinion and his explanatory letter were ignored, although unrebutted by any defense expert. However, the district court substituted its judgment for that of the expert (Pa42-49).

Thus, the district court erred twofold. First, it completely ignored the nearly identical analytical precedent of Bennun. Second, it completely and repeatedly ignored the clear direction of Rule 56, which prohibits the district court from resolving genuine issues of material fact. The overall, combined

effect of the district court's action was to depart so far from established judicial norms as to require the supervision of the Supreme Court in order to insure fundemental justice and to protect the Petitioner's constitutional and statutory right to a trial by jury.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Lawrence S. Schwartz*
Stephen J. Edelstein
SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
293 Eisenhower Parkway
Suite 300
Livingston, NJ 07039
(201) 740-1600
Attorneys for Petitioner

*Counsel of Record

93-642

NO. A-152

Supreme Court, U.S.
FILED
OCT 22 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LOIS A. FISHER,

Petitioner

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S APPENDIX

Lawrence S. Schwartz*
Stephen J. Edelstein
SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
293 Eisenhower Parkway
Suite 300
Livingston, New Jersey 07039
(201) 740-1600
Attorneys for Petitioner

*Counsel of Record

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5473 and 92-5497

LOIS FISHER, Appellant in 92-5473

v.

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY
Appellant in 92-5497

On Appeal from the
United States District Court
For the District of New Jersey
(D.C. Civil Action No. 90-00503)
District Judge: Honorable H. Lee Sarokin

Argued May 17, 1993

BEFORE: STAPLETON, ALITO, and SEITZ
Circuit Judges

JUDGMENT ORDER

After consideration of the

contentions raised by appellant, it is

ORDERED AND ADJUDGED that the

judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

_____
Circuit Judge

ATTEST:

_____
P. Douglas Sisk, Clerk

DATED: May 27, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LOIS A. FISHER,	:	Civ. No. 90-503 (HLS)
Plaintiff,	:	OPINION
vs.	:	
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,	:	
Defendant.	:	

Sarokin, District Judge

Before the court is defendant's motion for summary judgment.

Background

This suit concerns allegations of age and sex discrimination in the reappointment, hiring, and salary decisions of Rutgers, the State University of New Jersey ("Rutgers") regarding plaintiff, a former member of its faculty. Plaintiff Lois A. Fisher

applied in February 1984 and November 1984 for a faculty position at Rutgers' Graduate School of Management ("GSM").[1] Plaintiff was not hired by this department. However, plaintiff was hired by the University as an assistant professor in the Department of Business Administration of the Rutgers Faculty of Arts and Sciences-Newark ("FASN"), effective September 1, 1985.

Plaintiff's starting salary was $30,033. In March of 1988, the third year of Fisher's contract, Rutgers considered her for reappointment. The

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1. Fisher received a Ph.D. from the Department of Education of the Social Science Division of the University of Chicago in 1984. Plaintiff had received her A.B. in 1953 from Syracuse University with majors in social studies and secondary education, her M.S.S. at Syracuse's School of Social work in 1958, and a Certificate in Child and Adolescent Psychotherapy from the Chicago Institute for Psychoanalysis in 1966. Plaintiff 12(G) ¶ 1.

departmental committee recommended against reappointment. Subsequent evaluators concurred. Plaintiff challenged her non-reappointment under the grievance procedure established by the collectively negotiated Faculty Contract. Although the cause for the delay is disputed, the parties agree that no hearing on plaintiff's grievance occurred for more than a year after the grievance was filed, and eventually plaintiff withdrew her grievance.

On or about December 9, 1988, plaintiff filed a charge of discrimination with the New Jersey Division on Civil Rights (DCR) alleging sex discrimination. The charge was forwarded to the Equal Employment Opportunities Commission ("EEOC") for filing. On or about April 3, 1988, plaintiff filed an amendment charging age

discrimination as well.[2] Following receipt of a right to sue letter dated November 30, 1989, plaintiff filed the complaint in this case on or about February 1, 1990.

In her complaint, plaintiff alleges age and sex discrimination under Title VII, 42 U.S.C. § 2000e et seq. (Counts I & II), the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (the "ADEA") (Counts III & IV), and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. (the "NJLAD") (Counts V & VI), violations of the Equal Pay Act, 29 U.S.C. § 206(d)(1) (the "EPA") (Count X), and claims based on breach of contract (Count VII), breach of the implied covenant of good faith and fair dealing (Count VIII), public policy

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2. Plaintiff was born on February 22, 1932. Plaintiff 12(G) at ¶ 1.

(Count XI), and due process (Count IX). Plaintiff claims that she was discriminated against by defendants in four ways: (1) in the initial denial of a position at the GSM in February and November 1984; (2) in the setting of her salary as a professor at FASN; (3) in the denial of her reappointment at FASN in 1988; and (4) in the denial of her repeated requests to transfer from FASN to the GSM from 1984 through her nonreappointment at FASN. Plaintiff also contends that defendant breached its contract with her in the manner in which it considered her request for reappointment.

Defendant claims that its decision not to reappoint Fisher was based on reservations shared by all evaluators about her publishing record and teaching effectiveness and on market

considerations. Further, defendant maintains that Fisher's salary range was established before it was known she would be a candidate, and that the salary she was finally offered was based on her qualifications and competitive considerations in the teaching market.

Plaintiff alleges that the reasons proffered by defendant for its decisions were pretextual and that the real reason for her non-reappointment, failure to obtain a job at the GSM, and low starting salary was discrimination on the basis of age and sex. As evidence of pretext, plaintiff alleges that defendants made various misrepresentations to plaintiff about job opportunities and the competition for them, and that younger male applicants less qualified than herself were awarded both positions in GSM and reappointment in her department

at FASN. Plaintiff also alleges that her starting salary was lower than that of similarly situated but less qualified male faculty members. Finally, plaintiff submits statistical evidence purportedly demonstrating that men were more likely to be reappointed than women and younger faculty more likely than older faculty.

Defendant has now moved for summary judgment, claiming that plaintiff has failed to establish a prima facie case of age or sex discrimination because she was not qualified for reappointment nor for positions open at the GSM, and because defendant has proffered legitimate nondiscriminatory reasons for its employment decisions that plaintiff cannot show to be pretextual. Defendant also claims that the statute of limitations bars plaintiff's claims regarding her application to the GSM and

her salary. Defendant contends that plaintiff's contractual claims should be dismissed for failure to exhaust contractual grievance procedures. Finally, defendant claims that plaintiff has stated no cause of action for violation of public policy, the implied covenant of good faith and fair dealing, or due process.

Discussion

Defendant seeks summary disposition of this case. In order to prevail on a motion for summary judgment, the moving party must show that there are no genuine issues of material fact and that, viewing the facts in the light most favorable to the non-movant, the movant will prevail as a matter of law. Fed. R. Civ. P. 56. See, Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Wisniewski v. Johns-Manville

Corp., 812 F.2d 81, 84 (3d Cir. 1987).

Sex and Age Discrimination Claims

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is the starting point for analysis of employment discrimination claims. The McDonnell Douglas analysis has been adopted by the New Jersey Supreme Court to analyze claims under the New Jersey Laws Against Discrimination ("NJLAD"). Clowes v. Terminix International, Inc., 109 N.J. 575 (1988). To establish a claim under the McDonnell Douglas test, a plaintiff must show that:

> (1) she was a member of a protected class;
> (2) she applied, and was qualified, for a job for which the employer was seeking applicants;
> (3) despite her qualifications, plaintiff was rejected for the job;
> (4) following her rejection the employer either hired

> someone from outside of the protected class or continued to seek applicants.

The Third Circuit has modified the McDonnell Douglas test in cases involving tenure decisions. With regard to the qualification element, the plaintiff in a tenure case:

> need only show that [she] was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, [she] need show only that [her] qualifications were at least sufficient to place [her] in the middle group of tenure candidates as to whom a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body.

Roebuck v. Drexel University, 852 F.2d 715, 726 (3d. Cir. 1988) (quoting Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 63 (1st Cir.) (citations omitted), cert. denied, 454 U.S. 1098 (1981)).

McDonnell Douglas Corp. and its progeny, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Jackson v. University of Pittsburgh, 826 F.2d 230, 232 (3d Cir.1987), cert. denied, 484 U.S. 1020 (1988); and Jalil v. Avdel Corp., 873 F.2d 701 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990), articulate the burden of proof for Title VII cases. Plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. If plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to rebut the evidence of discrimination by articulating some legitimate, nondiscriminatory reason for the employee's discharge.

> The ultimate burden of persuasion, which remains always with the plaintiff, may

> then be met by proving by a preponderance of the evidence that the alleged reasons proffered by the defendant were pretextual and that the defendant intentionally discriminated against the plaintiff.

Jalil, 873 F.2d at 701 (citing Burdine, 450 U.S. at 252-53). The plaintiff may satisfy the ultimate burden of proving discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256 (citing McDonnell Douglas, 411 U.S. at 804-05).

Under the Equal Pay Act ("EPA") the test is slightly different. Once the plaintiff has established a prima facie violation of the Act, "the burden shift[s] to the defendants to prove by a

preponderance of the evidence that the wage differential was due to . . . any factor other than sex." Brewster v. Barnes, 788 F.2d 985, 991-92 (4th Cir. 1986) (citing 29 U.S.C. §206(d)(1) (1982); quoting Corning Glass Works v. Brennan, 417 U.S. 188, 196-197 (1974)). This burden is a heavy one. Id. at 992.

Non-Reappointment at FASN

Plaintiff contends that her nonreappointment to the position of assistant professor at the FASN in 1988 was the consequence of defendant's discrimination on the basis of age and sex. Defendant argues that this claim must be dismissed, because plaintiff cannot prove the essential element of her prima facie case that she was qualified for reappointment. Defendant argues that, although the present case is not a

tenure denial case, standards adopted by the Third Circuit for determining the qualification prong in tenure cases should be applied to plaintiff's claim. In Roebuck v. Drexel University, the Third Circuit held that in a tenure case, a plaintiff

> need only show that [she] was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, [she] need show only that [her] qualifications were at least sufficient to place [her] in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body.

852 F.2d 715, 726 (3d Cir. 1988) (citing Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 63 (1st Cir. 1981), cert. denied, 454 U.S. 1098 (1981)). Defendant further cites the more recent

case of Bennun v. Rutgers State University, 941 F.2d 154 (3d Cir. 1991), cert. denied, 112 S. Ct. 956 (1992), as providing a test for determining whether a candidate falls within the middle group of candidates. In Bennun, the Third Circuit concluded that "[t]he divergent votes of the various review groups show the sufficiency of Bennun's scholarly and academic credentials for attainment of the rank of full professor was debatable among the peers who evaluated him." Id. at 176 (citation omitted). Defendant concludes that this opinion represents a holding that at least some disagreement among reviewers is required to show that an applicant for faculty reinstatement falls within the "middle group," thus satisfying the qualification prong of the prima facie case.

The court disagrees, however, with

defendants' reading of Bennun. Nowhere in Bennun does the circuit court state that evidence of some support among faculty recommenders is necessary to establish that a candidate may be qualified for tenure or reappointment. Rather, Bennun presents the "divergent vote" approach as a sufficient, not a necessary means of satisfying the qualification prong. Further, it is evident to the court that evidence of divergent votes cannot be required to establish a prima facie case, if only because this would insulate a uniformly discriminatory hiring process from challenge under Title VII and the ADEA.[3]

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3. Also, although no reviewer recommended Fisher for reappointment, the Associate Dean of FASN-Business and then-chair of the Department of Business Administration and Accounting wrote in August 1987, in support of Fisher's application for a salary increase, that Fisher "is actively engaged in a research

Plaintiff further objects that precedents involving denial of tenure are inapplicable to a situation involving nonreappointment. In a Second Circuit case, Powell v. Syracuse University, 580 F.2d 1150 (2d Cir. 1978), cert. denied, 439 U.S. 984 (1978), the appellate court specifically addressed the showing required to satisfy the qualification prong in a non-reappointment suit:

> The plaintiff need not show perfect performance or even average performance to satisfy this element. He need only show that his performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the decision to discharge him.

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effort. She has two articles published or accepted in refereed journals and has participated in numerous professional meetings as a presenter or discussant. We believe she is a serious prospect for eventually being tenured." Plaintiff's Surreply, Ex. I.

Id. at 1155 (quoting Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1283 (7th Cir. 1977)).

Plaintiff argues that Powell embodies a different test for the qualification prong from Roebuck, and that only the Powell standard is applicable in a non-reappointment case. The court, however, finds no conflict between the Roebuck and Powell holdings. Roebuck held that to satisfy the qualification prong, a plaintiff need only show that she was in the middle group of candidates about whom a discretionary decision for or against employment would be justifiable. Powell suggests that the objective qualifications required to satisfy this requirement may be less demanding for reappointment than for tenure. However, it is consistent with Powell to find that

a nonreappointed plaintiff has made the required showing by demonstrating that she is at least in the middle group of candidates about whom a discretionary decision might be made.[4]

In the present case, plaintiff has made such a showing by her allegations that she was as qualified or more qualified that others who were granted reappointment. Fisher has submitted evidence showing that her credentials were in many respects at least equal to those of a male candidate considered for and awarded reappointment at the same

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4. To the extent that the Powell holding reflects the view that reappointment decisions involve less discretion than a tenure decision and carry a presumption in favor of reappointment, the court is unwilling to adopt this factual determination as a general rule. In the court's view, it is more appropriate to consider the particular reappointment policy of employers on a case-by-case basis.

time her application for reappointment was considered and rejected.[5] This

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5. The reappointment application forms show that both Castelino and Fisher published one article while at Rutgers, and that Castelino's was co-authored while Fisher's was sole-authored. Hosford Aff., Exs. 23 & 28. Fisher presented three papers at conferences while at Rutgers and two before she was hired by Rutgers. Castelino presented two papers while at Rutgers and one before being hired there. Id. Defendant maintains that plaintiff's comparison is flawed because plaintiff's publication was an outgrowth of her dissertation and was not management-oriented while Castelino's paper, published in a finance journal, was of much higher quality; because Castelino had published much more significant work before coming to Rutgers; because Castelino had three articles on review with referred finance journals and three additional projects in progress, while Fisher had only one article on review with a non-finance journal and her work in progress did not show significant growth beyond her dissertation topic; because Castelino had received competitive research grants; and because his professional involvements were more substantive and related to the field of finance. Def. Reply 10-14. Defendant's objections demonstrate that Castelino was arguably as qualified or more qualified than Fisher in many respects; but it does not rebut plaintiff's showing that her

comparison suffices to show that her "qualifications were at least sufficient to place her in the middle group" of candidates for reappointment, "as to whom both a decision granting [reappointment] and a decision denying [reappointment] could be justified as a reasonable exercise of discretion." Roebuck, 852 F.2d at 726.

Plaintiff's qualification for consideration for reappointment are also supported by the University's reappointment policy, which states that

> The term [of an initial appointment] is limited because the promise may not be fulfilled or because the University may not be in a position to reappoint even a satisfactory assistant professor.

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qualifications were sufficient to place her in the group from whom a discretionary decision for or against reappointment would be reasonable.

University Policies on Academic Appointments and Promotions at 10 (Plaintiff Dep. Ex. 22). David Hosford, the Dean of the FASN, concluded in his reappointment evaluation that plaintiff's "overall record is, at best, satisfactory." Reappointment Application, Form No. 6 at 2 (April 22, 1988) (Hosford Aff., Ex. 23). The wording of the University's policy suggests that a satisfactory record is sufficient to place a candidate in the group about whom a discretionary reappointment decision will be made, even if such a record is not, necessarily, sufficient to insure reappointment in all circumstances. Finally, the court observes that "it plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decision making process

and thus allowed discrimination to infect the ultimate decision." Roebuck, 852 F.2d at 727. Accordingly, the court does not attach significant weight in determining plaintiff's qualifications to subsequent decisions which, concurring with the initial evaluation by the departmental committee, recommended against her reappointment. Therefore, the court finds that plaintiff has satisfied the qualification prong of her prima facie case with respect to her claim of discrimination in her nonreappointment at the FASN.

Defendant further contends, however, that even if plaintiff establishes her prima facie case, defendant should still prevail on summary judgment, since plaintiff has raised no material issue of fact concerning the pretextuality of defendant's articulated legitimate,

nondiscriminatory reasons for her nonreappointment. Under Third Circuit precedent, a plaintiff can avoid summary judgment only if she can produce evidence of pretext sufficient to create a triable issue. Fowle v. C & C Cola, 868 F.2d 59, 62 (3d Cir. 1989); Healy v. New York Life Insurance Co., 860 F.2d 1209, 1219 (3d Cir. 1988), cert. denied, 490 U.S. 1098 (1989). Pretext may be established either "directly," by persuading "the court that a discriminatory reason more likely motivated the employer or indirectly," by showing "that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). In order to raise an inference of pretext through comparison to other tenure candidates, the evidence must not merely show a "context of

disagreement," but must be sufficient "to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race." Zahorik v. Cornell University, 729 F.2d 85, 94 (2d Cir. 1984). As the Bennun court has held, "glaring" inconsistencies between the treatment of applications by a plaintiff and other applicants may alone be sufficient to raise such an inference of forbidden considerations. 941 F.2d at 179.

Because plaintiff has not identified such "glaring inconsistencies" or other evidence that defendant's doubts about her were influenced by forbidden considerations, the court concludes that Fisher has not provided evidence of pretext to create a triable issue. Although she carried her prima facie case, she has failed to produce any

evidence on the basis of which a reasonable jury could reject defendant's proffered legitimate reasons for not reappointing her. Accordingly, Fisher's sex and age discrimination claims based on her non-reappointment at FASN will be dismissed.

Although plaintiff has identified certain inconsistencies in the treatment of her application for reappointment and of a similarly situated, younger male's application, the court finds that defendant has proffered unrebutted legitimate reasons for all these "inconsistencies" and that they do not, in any event, represent the type of "glaring" inconsistency required under Bennun to raise an inference of discrimination.

First, plaintiff contends that the comments concerning professional activity

in both the Appointments and Promotions Committee Form and the Departmental Discussion and Recommendations were virtually identical for her and Castelino: both were said to have "been appropriately active in professional activities." Castelino and Fisher Reappointment Packets, Forms 4 & 5 (Hosford Aff., Exs. 23 & 28). Further, Dean Hosford rated plaintiff's professional activity as "above average," and commented that "Dr. Fisher has a quite extensive and appropriate record of professional activity. It is certainly somewhat stronger than might be expected." Fisher Reappointment Packet, Form No. 6, at 2 (Hosford Aff., Ex. 23). However, plaintiff's performance in the professional activities category was uniformly rated as being "average" by these review committees, while Castelino

was uniformly rated as "above average." Defendant explains the difference in rating on the grounds that all but two of plaintiff's professional activities involved higher education organizations rather than management organizations, while Castelino had presented three papers at finance organizations, was a reviewer for two finance journals, and had been a senior consultant in a relevant finance-oriented company. The court finds that this distinction expresses a legitimate preference for activities within Castelino's own field of finance--indeed, plaintiff's lack of credentials and accomplishments within her field, management, was a consistent source of criticism throughout the review process.

Second, plaintiff points out that in Castelino's Departmental Recommendations,

his receipt of several grants is listed as a factor contributing to the evaluation of his research accomplishments; while Fisher's recommendation does not mention the several similar grants she received. Id. Defendant, however, has submitted affidavits from the Dean of FASN and the Provost of Rutgers' Newark campus, and the deposition of a Professor on her Departmental committee, stating that Castelino's grants were more significant because they included two grants from the Coordinating Council of Business Studies which were awarded competitively based on faculty peer review of the recipient's research. Gilad Dep 67; Hosford Aff. ¶ 63; Samuels Aff. ¶ 29. Once more, this unrebutted legitimate reason dispels any inference of discrimination that might be drawn from the different treatment

accorded Fisher and Castelino.

Third, the below-average student assessment of the difficulty of her four courses is noted, implicitly as a negative factor, in Fisher's Departmental Recommendation; while Castelino's Departmental Recommendation is silent concerning the same statistic, although in one of the two courses for which he provided student assessments, his rating was identical to Fisher's average rating. Id. In his deposition, the chair of plaintiff's department explained this discrepancy, stating that Fisher's subject matter difficulty evaluation was singled out because there was "mismatch of perceptions," since Fisher thought her students were poorly prepared, while the students found the course easier than others. When asked why this "mismatch" was noted, the chair stated that "we were

puzzled" about the discrepancy. Venezian Dep. 118-19 (Def. Dep. Excerpt P). The "puzzling" mismatch was also noted on Fisher's Departmental Recommendation. Form No. 4 (Hosford Aff. Ex. 23). Once more, these unrebutted explanations eliminate the possibility that any inference of discrimination may be drawn from defendant's behavior toward Castelino.

In addition to these principal points, Fisher also points to certain minor procedural irregularities in the treatment of her reappointment decision. Fisher contends that Emilio Venezian, her department chair, failed to notify or convene all of the tenured faculty to participate in the decision and, contrary to a University prohibition, voted with the department rather than submitting a separate, independent evaluation; that

Venezian asked Fisher for proof of certain statements in her reappointment application and further information that he did not request from other candidates; and that Rutgers considered her for reappointment in the third, rather than the second year of her employment, in violation of the terms of her contract.

The court finds that these objections, even if unrebutted, would provide at most extremely weak evidence of discriminatory intent, in the absence of further evidence that any of these procedural irregularities had or was likely to have an adverse impact on plaintiff's prospect for reappointment. Further, defendant has proffered legitimate reasons for each of these procedural "irregularities," to which plaintiff has offered no plausible rebuttal.

Defendant has submitted sworn statements that, as of Spring 1988, University policy provided that the department chair was supposed to participate and vote with the departmental committee rather than completing a separate chair's statement where the total number of faculty eligible and present to sit on the committee, including the chair, was three. Ambrose Aff. 8-15; Hosford Aff. 69-70. Further, the same procedure, with Venezian voting with the committee, appears to have been followed in the review of Castelino's application for reappointment.[6] The absence of Professor

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6. Plaintiff contends that the new regulation providing for the chair to participate in the departmental rating "in a department of three tenured faculty members," even if it applied to plaintiff's application, did not justify the inclusion of Venezian. Plaintiff Surreply at 2 & Ex. B. Plaintiff argues

Blake from the departmental committee is adequately explained by the fact that he had been ill, as plaintiff acknowledges. Plaintiff Surreply at 3 & Ex. F. As for the timing of her reappointment decision, defendant has given the unrebutted explanation that every other FASN assistant professor evaluated for

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that the regulation applies to departments with no more than three members, not where no more than three members are available, as defendant contends. The court, however, finds that defendant's interpretation of the regulation is both credible and plausible, particularly in view of the fact that the regulations do not provide for deferring decisions on reappointment candidates where tenured department members are unavailable to participate. Even if plaintiff's interpretation of the regulation is equally plausible, there is nothing in defendant's choice of a reading importing the requirement of "availability" to raise an inference of discriminatory animus, and plaintiff does not claim that defendant applied its "available faculty" criterion inconsistently, singling her out for different treatment then any other reappointment candidate.

reappointment in the spring of 1988, including Castelino, was reviewed in their third year of employment. Finally, defendant has explained that Venezian requested verification that a particular journal in which Fisher published was refereed, while making no such inquiry of Castelino, because Venezian was familiar with the journals in which Castelino published but did not recognize Fisher's journal. Venezian Dep. 102-104. This reason is unrebutted in fact, because the journal in which Fisher published was a higher education journal, Venezian's ignorance of it supports defendant's claim that Fisher's academic credentials were limited to fields other than those for which she had been hired.

In addition to Castelino, plaintiff has sought to compare herself with four other FASN assistant professors in other

departments who were reappointed in 1988. All were younger men. Because these faculty were evaluated by different departmental committees, the usefulness of the comparison in establishing discrimination against plaintiff is limited. But, in any event, defendant has once more proffered unrebutted legitimate reasons for its employment decisions with regard to these faculty members, which explain the apparent disparate treatment that plaintiff identifies.

Thus, Professor Ferguson received unanimous-outstanding ratings at all levels. Plaintiff's objection that Ferguson had no refereed articles published at the time of his evaluation is irrelevant, because, as Rutgers Provost Norman Samuels and FASN Dean David Hosford have explained in sworn

affidavits, defendant's decision regarding Ferguson was based on the fact that he had edited and written portions of books, had a substantial number of articles well-advanced in the publication process, and had received outstanding ratings for teacher effectiveness. Hosford Supp. Aff. 2-7; Samuels Supp. Aff. 2-11. Similarly, although Professor Fowles had fewer published articles at the time of his reappointment decision, he had three articles under revision with "top journals," had produced computer software distributed on a nationwide basis, was rated above average for teaching effectiveness, and was judged to be valuable to other faculty members as an applied econometrician. Samuels Supp. Aff. 14, 16-17 & 22; Hosford Supp. Aff. 10-13 & 16. Plaintiff notes correctly that Professor Einhorn received a

below-average rating for teaching effectiveness from one departmental evaluator; however, he also received two average and one above average rating in this same category and additionally had a long list of publications and work in progress. Hosford Supp. Aff. 26-30; Samuels Supp. Aff. 23-27. Finally although Professor Timberg received low ratings for teacher effectiveness, he had a fairly extensive record for research accomplishments and was "head and shoulders" above any other member of his department, which defendants recognize as one of the weakest at FASN. Hosford Supp. Aff. 18-20, 23-24; Samuels Supp. Aff. 30-34.

Based on the unrebutted evidence submitted to the court, it appears that all of these candidates were, at least within the context of their departments,

stronger candidates for reappointment than Fisher. None of these candidates was reappointed despite a unanimous negative assessment by his departmental committee, like Fisher received. Defendant has submitted legitimate reasons for all the apparent disparities that plaintiff identifies. At most, the evidence submitted by Fisher suggests that there might have been some grounds for disagreement about whether the four male professors were qualified for reappointment. However, as with Castelino, Fisher has entirely failed to point to any "glaring" inconsistency of the type required to raise an inference of pretext in the face of legitimate reasons such as those proffered by defendants for denying Fisher's application for reappointment. Bennun, 941 F.2d at 179.

Plaintiff has also submitted statistical evidence which, she claims, supports her allegations of discrimination. It has been recognized that a viable "method of establishing the nexus between age discrimination and adverse employment action is by statistical proof of a pattern of discrimination." Pace v. Southern Railway System, 701 F.2d 1383 (11th Cir. 1983), cert. denied, 464 U.S. 1018 (1983). Thus, "statistical proof or other 'evidence of a pattern of terminating older workers . . . allow[s] the reasonable inference that age had played a role in appellant's discharge." Pace, 701 at 1388 (quoting McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980)). The Third Circuit has also stated that "the inference of unlawful discrimination may be raised,

and thus '[a] prima facie case of disparate treatment may be established by statistics alone if they are sufficiently compelling.'" Green v. USX Corp., 843 F.2d 1511, 1527 (3d Cir. 1988), vacated on other grounds, 490 U.S. 1103 (1989) (quoting Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985)).

In 1987 and 1988, the year of and the year following her application for reappointment, a total of 16 professors, 12 male and 4 female, sought reappointment at FASN; all but 2 were reappointed.[7] All 12 men were reappointed. Two of four women were denied reappointment. Of this same pool of 16 professors, 13 were under 40 and 3

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7. These statistics exclude two men, one of whom was over 40, who were reappointed at FASN in 1987, but were originally appointed at a different institution in a different job unit.

were over 40. All professors under 40 were reappointed and 2 out of the 3 professors over 40 were not reappointed. Thus both the professors denied reappointment at FASN in this two-year period were women over forty.[8] Plaintiff's 12(G) Statement, ¶¶ 67-68; Fisher Aff. 10-11.

Plaintiff has submitted the affidavit of a Princeton University economics professor who has reviewed this data to determine whether there is statistical evidence of discrimination on the basis of age and sex at FASN and the GSM. The expert stated that:

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8. The court finds it inappropriate to draw any inference about discriminatory animus at the FASN from the alleged actions of the GSM in response to plaintiff's applications for transfer. Therefore, plaintiff's statistics concerning employment decisions by the GSM will not be considered in determining the pretextuality of FASN's reasons for denying her reappointment.

> I conclude that the average age of those not reappointed was higher than the average age of those who were reappointed and that this difference is unlikely to have arise by chance. I also found that older faculty were less likely to be reappointed than younger, faculty, and that this difference was statistically significant for GSM and FASN faculty together according to the Chi-Square test, but not Fisher's Exact Test. The difference among FASN faculty was not statistically significant according to either test. Women were also less likely to be reappointed than men. The difference between the reappointment rates of women and men is generally statistically significant.

Ashenfeltter Aff. ¶ 17.

Such evidence is clearly not irrelevant to Fisher's claims, and supports her prima facie case. However, the case is now in a different posture: the prima facie case has been made and defendant has come forward with legitimate reasons for its actions. The

question now before the court is whether there is any material fact in dispute that might support a finding that these proffered reasons were pretextual. As stated above, the comparisons Fisher seeks to draw to other reappointment candidates do not raise a triable issue regarding the presence of discriminatory intent. The question therefore presents itself whether plaintiff's statistical evidence, standing alone, can raise such a triable issue regarding pretext. The court finds that it cannot.

Plaintiff's expert concludes that there is no statistical significant pattern of age disparity in reappointment decisions and that the evidence of sex disparity was, at best equivocal, since, while one test suggested the pattern was statistically significant, another did not. The probative value of these

statistics is further weakened by the small sample size involved. See Pace, 701 F.2d at 1389. However, the court finds of chief significance the fact that plaintiff's non-reappointment statistics include her own case, with regards to which, as described above, there is no basis for assuming discriminatory animus apart from these statistics themselves. Apart from her own case, plaintiff thus can point to only one other instance of non-reappointment as the basis for the alleged pattern of discriminatory conduct by defendants.

The court concludes that this evidence is simply insufficient to allow a reasonable jury to conclude that defendant's proffered reasons for denying Fisher reappointment were pretextual. No particularized evidence has been submitted regarding the other candidate

denied reappointment beside Fisher. Fisher asks the court only to consider the statistical pattern as evidence of discriminatory animus. But the court finds it outside the scope of reasonable inference to conclude from reliance on a single datum point that defendant's conduct displays a pattern of discrimination, in view of the absence of any evidence of discrimination apart from that alleged pattern in Fisher's own case and of the unrebutted legitimate reasons proffered by defendant for its decisions regarding Fisher.

In these circumstances, plaintiff's statistical evidence does not raise a material issue of fact concerning the credibility or legitimacy of defendant's reasons for its actions. Accordingly, since neither plaintiff's comparative nor statistical evidence raises an inference

of pretext, plaintiff's discrimination claims with regard to her nonreappointment will be dismissed.

Refusal to Hire at the GSM: 1984 Applications

Defendant claims that plaintiff has failed to establish a prima facie case that defendant discriminated unlawfully in refusing to hire her for a position at the GSM in February and September 1984. Defendant does not dispute that plaintiff makes out the first element of her McDonnell Douglas prima facie case. Nor does defendant dispute that the candidates it hired were from outside the protected classes. Defendant's claims focus on its contention that plaintiff did not satisfy the second prong of the McDonnell Douglas test. In particular, defendant contends both that there was no

position available in February 1984 and that plaintiff was not qualified for the positions for which she applied in February and September 1984.

Defendant maintains that in both February and September 1984, the Organization Management Area in the GSM was seeking personnel specializing in Business Policy and Strategy or Technology Management and Innovation, and that plaintiff's lack of qualifications in those fields rendered her unqualified for the positions she sought. Defendant has submitted an affidavit from George Farris, the chair of the Organization Management Area of the GSM at the time plaintiff was applying for a position there. Farris states that when plaintiff applied, the GSM was seeking faculty for the areas of Business Policy and Technology Management and that plaintiff

had no meaningful background or experience in either area. Farris Aff. at ¶¶ 6 & 8. Plaintiff has also submitted the deposition testimony of David Blake, the GSM Dean during the period of plaintiff's applications to GSM. Blake states in his deposition that, during this time, GSM was attempting to strengthen its research and teaching capabilities, especially in the area of business policy, and that two faculty were hired who strengthened the business policy area, and one who partially strengthened this area and also had expertise in management technology. Blake Aff. 69-70 & 72-73.

The court needs not dwell on whether plaintiff has succeed in establishing her prima facie case, however. For, assuming that the prima facie case has been made out plaintiff fails to raise a triable

issue as to the pretextuality of defendant's proffered reasons for failing to hire her at the GSM in 1984. Defendant has submitted sworn statements that in both February and September 1984, it was seeking personnel for GSM specializing in fields in which plaintiff had few if any credentials and no experience. Plaintiff argues that GSM did not explicitly advertise specifically for these fields and that the personnel eventually hired by GSM have taught outside these areas, in subjects that fall within Fisher's specialty. Further Fisher argues that she was closer to receiving her Ph.D. than either of the candidates hired in February 1984 and more qualified than the candidate hired

in September 1984.[9]

However, none of these contentions raises a reasonable inference that defendant's explanation that it was simply looking for someone with a different area of specialization was pretextual. The advertisements to which plaintiff refers solicited faculty for both the GSM and "the undergraduate programs of Rutgers," and listed both "Business Policy" and "Organization Management" as fields in which faculty were sought. Ferris Aff., Exs. 2 & 4. This general advertisement is consistent

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9. Plaintiff also alleges that of the sixteen faculty members hired in the organization management area at GSM since the 1983-1984 academic year, all were male, only one was over forty, and he was denied reappointment. However, plaintiff has produced no statistical evidence that this pattern raises an inference of discrimination, apparently because plaintiff lacks information about the relevant applicant pool. Plaintiff Mem. 20.

with defendant's claim that GSM sought only faculty in the business policy area. Assuming that plaintiff is correct that the individuals hired to the GSM positions taught courses at some point in the Organization Behavior area, that fact does not cast doubt on defendant's statement that it sought personnel specializing in business policy or technology management. Plaintiff does not claim that the professors hired by GSM did not teach in these fields, nor that they taught even extensively in the Organization Behavior area. Occasional teaching in a distinct area does not raise a reasonable inference that defendant's claim that these professors were hired because of other specialties lacks credibility.

As for her claims that she was more qualified then the men hired to the 1984

positions, Fisher admits that she had not yet received her Ph.D. at the time she applied to the GSM for the February 1984 position. However, even if she were clearly more advanced towards her Ph.D. than were the two males hired at that time, that factor, standing alone, does not render reasonably incredible defendant's contention that it preferred the two males over her because they specialized in the field for which GSM was then seeking to strengthen its faculty, particularly in view of the fact that the advertisements, to which Fisher refers, stated that "ABD's in final dissertation stage will be considered." Ferris Aff., Exs. 2 & 4. Finally, the then-chair of the Organization Management Area in GSM has averred that the male hired in September 1984 had obtained his Ph.D. in 1983 and "presented considerable

qualifications regarding the introduction and innovation of major new technological systems in organizations, a significant aspect of Technology Management." Farris Aff. ¶ 14. Once more, in light of these unrebutted assertions, plaintiff has failed to carry her burden of submitting any evidence from which a trier of fact could reasonably infer that defendant's legitimate reasons for refusing to accept her application to transfer to GSM were pretexts for discrimination.

Refusal to Hire at the GSM:
Post-Nonreappointment Application

Following receipt of her notice of nonreappointment, plaintiff met with Provost Samuels in June 1988, at which time plaintiff asked that the Provost consider transferring her to GSM. Plaintiff was not transferred, and has

alleged that this employment action is part of defendant's pattern of discrimination on the basis of age and sex.

Defendant contends that plaintiff has failed to establish a prima facie case with respect to this claim since plaintiff requested that she be hired for the 1988-89 academic year and that, at the time she made this request, there were no openings since faculty recruiting for that year had been completed as of June 1988. However, plaintiff responds that this argument is premised on a factual error concerning her request of Provost Samuels. Plaintiff contends that she was actually seeking an Organization Management Area position for the 1989-90 academic year and not for the 1988-89

academic year.[10] Plaintiff states that at the same time she made her request for a 1989-90 position, she sought unpaid leave for the 1988-89 academic year so she could accompany her husband to a university in another part of the country, where he had accepted a position as a visiting professor. Defendant does not claim that there were no openings in the Organization Management Area for the 1989-90 academic year. Indeed, plaintiff contends that, at the time she made her

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10. Defendant argues that because plaintiff's complaint is "devoid" of allegations concerning an attempted transfer to GSM in 1989-90, she should not be permitted to raise such claims at this time. Def. Reply 33. Plaintiff's complaint alleges that "[i]n June, 1988, and in subsequent months plaintiff again requested . . . that she be transferred to GSM." Complaint ¶ 6. The court finds that this allegation, although lacking somewhat in precision, adequately states a claim based on plaintiff's alleged application in the months after June 1988, for transfer to GSM for the academic year 1989-90.

request, it was her understanding that such positions remained unfilled. According to plaintiff, she was correct in this understanding because a male under forty was ultimately hired for a 1989-90 position in the Organization Management Area at GSM in September 1989, well after plaintiff had applied.

However, assuming that plaintiff in fact sought to transfer in the 1989-90 academic year, and that such positions remained unfilled at the tine she approached Provost Samuels, the court finds that Fisher has failed to establish her prima facie case for this claim for a different reason: she has produced no evidence to suggest that she submitted a resume or other form of application to the Organization Management area at the GSM, and the then-chair of the Organization Management area has sworn

that he received no resume or letter of application from plaintiff after November 1984.[11] Farris Aff. ¶ 15. The second prong of the McDonnell Douglas test requires that a plaintiff show that she applied, and was qualified, for a job for which the employer was seeking applicants. 411 U.S. 792 (1973). Apart from her claim to have spoken to Provost Samuels, plaintiff has neither produced evidence nor alleged facts sufficient to establish that she applied for a position at the GSM for 1989-90. Further, plaintiff has produced no evidence supporting her claim to have been qualified for transfer to the GSM at that

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11. In her deposition, plaintiff stated that she did not submit an application for employment to the Graduate School of Management or a curriculum vitae for consideration by the Organizational Management area at GSM after her appointment at FASN in 1985. Fisher Dep. 121-122 (3/4/91) (Def. Dep. Ex. 1).

time. The court therefore concludes that plaintiff has failed to establish her prima facie case with respect to her allegations of discrimination in GSM's refusal to accept her transfer for the 1988-89 or 1989-90 academic years.

Setting of Plaintiff's Salary

In addition to her claims of nonreappointment and non-hiring, plaintiff alleges that defendant violated the Equal Pay Act, 29 U.S.C. § 206(d), which forbids discrimination in wages on the basis of sex.[12] Defendant argues

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12. Under the EPA, the structure of proofs varies from the familiar Title VII analysis. Once plaintiff establishes a prima facie case, by showing that plaintiff's job was substantially identical to a male's job but that she was paid less--defendant must show by a preponderance of the evidence that the differential in pay was based on merit, seniority, or some factor other than sex. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974); Brewster v. Barnes,

that, assuming that plaintiff can establish a prima facie case of age and sex discrimination regarding her salary level during 1985 and 1986, it should still prevail on its motion for summary judgment since it has come forward with evidence of legitimate, nondiscriminatory reasons for the relatively low setting of plaintiff's salary, and plaintiff has not raised a material issue of fact supporting her claim that these proffered reasons were pretextual.

Defendant claims that, before the time plaintiff's initial salary was set, Dean Hosford had determined a proposed salary range of $30,000 to $35,000 for a faculty position in the field of Organization Management. Defendant claims this salary range was based upon

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788 F.2d 985, 992 (4th Cir. 1986).

then-current market conditions. Defendant further claims that Hosford placed plaintiff on the bottom end of this range because he had reservations about the appropriateness of plaintiff's credentials for an Organization Management position. Specifically, defendant cites as causes of Hosford's concern that plaintiff lacked a business school doctorate, that her dissertation was not in a business discipline, that she had very limited experience teaching courses in organization management, and that she had no meaningful research program in the management field.

In a letter dated April 25, 1985, Fisher wrote to Dean Hosford, inquiring as to the range and step of her salary. Hosford replied by letter on July 8, 1985 that the salary quoted in her letter of offer, $30,033.00, was "a dollar amount

that did not indicate precise range and step. That figure will be placed, as appropriate, on the new salary scale effective July 1, 1985." Hosford Aff., Ex. 12. Plaintiff points to a document which, she claims, belies Hosford's assertion that plaintiff's salary was set at no particular range or step. Dean Hosford had signed a Search Authorization Procedure and Hiring Authorization Procedure Form ("SAP/HAP") on April 1, 1985 which indicated that plaintiff's salary range was 25, the step was 18 and that plaintiff's salary would be $30,033.00. Hosford Aff., Ex. 4, at 2.

Plaintiff contends that the discrepancy between Hosford's July 8 letter and the SAP/HAP Form casts doubt upon defendant's good faith in setting plaintiff's salary. Although Hosford's alleged misrepresentation does not

provide direct evidence of discriminatory intent, it does, according to plaintiff, provide indirect evidence of pretext, by suggesting "that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The court, once more, disagrees. In response to plaintiff's prima facie case, defendant has proffered numerous legitimate, market-based reasons for setting plaintiff's salary at the bottom of the range established by Dean Hosford. Plaintiff's sole evidence that these reasons were pretextual is Hosford's alleged misstatement that no range and step had been assigned to Fisher as of July 8, 1985. The court doubts that a misstatement about plaintiff's range and step, even if intentional, could be reasonably viewed as evidence of salary

discrimination, since plaintiff was obviously aware of her salary and would not have been prevented by such a misstatement from comparing the amount she was paid to the salary received by similarly situated male employees. It would be unreasonable for a jury to conclude that Hosford's statement provides any evidence that defendant's proffered reasons for her salary level are unworthy of credence, since placement on a range and step has no bearing on the reasons for the level of her pay. It is no more inconsistent with defendant's proffered reasons for plaintiff's salary to learn that plaintiff was assigned to a given range and step than to learn she was assigned to no range and step at all.

Moreover, the court finds that plaintiff's argument fails for a further reason. As plaintiff herself admits,

Hosford stated, in the same letter in which he represented that no range or step had yet been assigned to her, that her salary "figure will be placed, as appropriate, on the new salary scale effective July 1, 1985." Given this representation, no reasonable juror could conclude that Hosford was attempting to conceal evidence of discrimination from plaintiff: in fact, his statement implies that Fisher had already been assigned to a range and step by the date the letter was dispatched on July 8, 1985. Such a statement is inconsistent with an intent to deceive, since it would invite a job candidate interested in her range and step to inquire immediately as to what action had been taken on July 1, 1985. That plaintiff appears never to have made such an inquiry further supports the common-sense conclusion that it was the

amount of her paycheck, and not her place on the salary scale, that was of interest to her. Accordingly, the court concludes that plaintiff has failed to raise a material issue of fact that defendant's proffered reasons for her salary assignment were a pretext for discrimination.

For the foregoing reasons, plaintiff's claims of discrimination on the basis of age and sex will be dismissed in their entirety. Because consideration of the merits of her claims is dispositive, the court will not review defendant's further arguments that plaintiff's claims are barred by the statute of limitations.

Exhaustion of Contractual Grievance Procedure

In Count VII of her complaint, Fisher alleges that in processing her reappointment, defendant violated numerous University regulations and provisions of the Faculty Contract between the University and the Rutgers Council of AAUP Chapters. Based on these allegations, Fisher brings a claim for breach of contract against defendant. Complaint ¶¶ 21-22.

It is undisputed that these claims are subject to a requirement, set forth in Article X of the Faculty Contract, that a plaintiff must first exhaust the contractual grievance procedure before raising her claims in court. Def. 12(G) at ¶ 184; Ambrose Aff. ¶ 17 & Ex. 7. See Garrow v. Elizabeth General Hospital & Dispensary, 79 N.J. 549, 558 (1979)

("[e]xhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle"). However, plaintiff claims that she is exempted from pursing her claims to exhaustion by virtue of the futility exception to the exhaustion requirement.

Fisher's claim is based on her allegation that defendant's alleged repeated delays in considering her grievance was a legitimate basis on which to invoke the futility exception. In Angel v. Pan American World Airways, Inc., 519 F. Supp. 1173, 1177 (1981), overruled on other grounds by Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694, 714 (D.C. Cir.), rev'd, 417 U.S. 597 (1986), a district court found that, where an administrative complaint had been pending for thirteen years, the case fell within the futility

exception to the exhaustion requirement. See also Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591 (1926) (finding that administrative remedies need not be exhausted where the agency "for a period of two years, remained practically dormant; and nothing in the circumstances suggest[ed] that it had any intention of going further with the matter"). However, a circuit court has recently stated that "administrative delay could meet the futility exception only where it appears that agency inaction is in reality a statement by the agency of its unwillingness to consider the issue." Randolph-Shepherd Vendors of America v. Weinberger, 795 F.2d 90, 106 (D.C. Cir. 1986). Further, a plaintiff is not "free to by-pass" administrative remedies "based upon [the] unfounded belief that resort to such remedies would be futile."

Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 952 (D.N.J. 1991).

Fisher alleges that she first filed an intent to grieve letter on July 15, 1988. She received an extension and submitted her Article X filing form on September 15, 1988. Rutgers returned the grievance on September 23, 1988, requiring "appropriate revisions."[13] Fisher filed the revised grievance, retaining seven claims disallowed by defendant, on October 21, 1988.[14] Rutgers again returned the grievance for revisions on November 8, 1988, on the

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13. Rutgers stated that twelve out of nineteen of plaintiff's claims were not cognizable under the Article X grievance procedure and that plaintiff had not submitted her grievance on the mandatory filing form. Ambrose Aff. ¶ 25.

14. According to defendant, the AAUP Grievance Administrator had requested an extension of the ten day deadline on plaintiff's behalf. Id. at ¶ 26.

basis that two claims should continue to be disallowed and that plaintiff had not used the proper grievance form. Id. at ¶ 28. Fisher appealed this rejection and her appeal was denied on January 23, 1989. On February 6, 1989, she filed a second revised grievance, which Rutgers accepted on February 15, 1989.

Fisher filed an expanded grievance statement on March 28, 1989; defendant asserts that this filing date was once more based on an extension of time beyond the filing period mandated by Article X. Id. at ¶ 31. On May 2, 1989, Rutgers' response was filed. Article X requires that this response be filed "within 25 working days" of receipt of the expanded grievance statement. Ambrose Aff., Ex. 7 at 24. Plaintiff claims that defendant missed this deadline; however, counting only weekdays, defendant's submission was

timely. The grievance committee is required by Article X to meet to hear the grievance within ten working days of receipt of the University's response. However, the first hearing date was set for June 2, 1989. At this hearing, Rutgers allegedly requested that a "key witness" be allowed to testify out of turn to accommodate his travel plans. Fisher refused. As a result of this dispute, the hearing was rescheduled for June 19 and 20, 1989. Fisher's counsel later sought and received a postponement of these dates.

Thereafter, no hearings were convened through the summer months, allegedly because of Rutgers' scheduling problems in convening the grievance committee during the summer. Further,. one committee member was unavailable in the first part of the fall 1989 semester

because of a vacation, and Rutgers did not offer to substitute another grievance committee member. Allegedly, Rutgers was unable to agree to any date proposed by plaintiff until the third week in October, except for a sole day in September. The parties agreed that an isolated hearing date was pointless. Rutgers proposed meeting in November; Fisher insisted on beginning the process in October. Rutgers then proposed half-day hearings on October 24, 25 and 26 with four full days set aside in the middle of November. Fisher's attorney responded,

> We do not believe that three half-day sessions will be enough to complete the hearing. Therefore, we must insist on the following schedule: October 24 (afternoon), October 25 (all day), and October 26 (all day). As a back up, in case we do not conclude, we propose October 30th. It is essential that, within reasonable scheduling,

> all witnesses, including administration, be available. Unless this schedule is acceptable, we will be forced to conclude that our efforts to exhaust the grievance process are futile and we will proceed to other remedies.

Letter of Stephen J. Edelstein to Professor Rohr, Oct. 10, 1989 (Plaintiff Dep. Exh. 2).

In a letter dated October 24, 1989, the day the hearing was to have commenced, Fisher's attorney sent a letter to Rohr, confirming a telephone conversation on October 20, in which the attorney had informed Rohr that plaintiff was "holding to [her] position as expressed" in the October 10th letter and that, as that letter stated, "we will take such further steps as we believe to be consistent with our client's legal rights." Plaintiff Dep. Ex. 3. A letter

from Rutgers' Assistant Vice President for Faculty Affairs to Professor Rohr, copied to plaintiff's attorney, and dated November 17, 1989, stated that:

> [t]he University's position is that this history does not demonstrate the futility of the contractual grievance process. On the contrary, the grievant has demonstrated on several occasions that she is unwilling to pursue this Article X grievance. Accordingly, the University deems this Article X grievance to have been withdrawn.

Plaintiff Dep. Ex. 4.

Article X provides that:

> The number of additional hearings . . . shall be consonant with the provision of an expeditious hearing. . . . all parties to the grievance procedure . . . are charged with the responsibility for cooperating in the scheduling and hearing of the grievance in an expeditious manner, so that the grievance committee is enabled to complete hearing of the grievance within 25 working days of the initial hearing.

Ambrose Aff., Ex. 7 at 24. The lengthy period over which plaintiff's grievance hearings were scheduled clearly does not comply with this provision; although defendants contend that such non-compliance was the norm in grievance procedures.[15] In any event, the court concludes that breach of the terms of Article X is not sufficient to entitle plaintiff to conclude that resort to the grievance procedure was "futile."

To the contrary, the court finds that plaintiff has not raised a material issue of fact concerning the futility of resorting to the grievance procedure.

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15. Rutgers' Assistant Vice-President for Faculty Affairs stated in his affidavit that "it is not unusual that grievances not completed before the end of the spring semester are carried to the fall semester," and that "five grievances filed in 1987 and 1988 regarding denials of tenure were still pending as of September 1989." Ambrose Aff. at 19, 21.

The period from the initial filing of the intent to grieve letter on July 15, 1988, through the filing of the second revised grievance, on February 15, 1989, was occupied by a dispute over the scope of the grievance; the legitimacy of this dispute is indicated by the fact that plaintiff dropped several claims in response to each denial by Rutgers. Plaintiff then received an extension to file her expanded grievance statement on March 28, 1989. Rutgers' response was timely filed on May 2, 1989. Thereafter, the grievance committee did not keep to the timetable prescribed by Article X; although these delays were caused in part by plaintiff's request for adjournments. However, assuming that all subsequent delays were attributable to Rutgers, the total elapsed time, from the filing of defendant's response in May, through the

dates in mid-November when Rutgers offered to schedule four full hearing days, was less than eight months. This period is considerably less than the delay that has sufficed to establish futility in any case called to the attention of the court. See, e.g., Angel, 519 F. Supp. at 1177 (13 years); Smith, 270 U.S. at 591 (two years).

Further, based on Fisher's own submissions, it appears that she contributed to this delay, by requesting extensions prior to May 1989, seeking to postpone two hearing days set for June, requesting only certain hearing dates in September and October, agreeing not to meet on the single day proffered in September, and refusing to meet on the half-days in October or to wait until November. Plaintiff Dep. Ex. 2.

Most important, plaintiff has failed

to raise any material fact or point to any evidence raising an inference that Rutgers' "inaction is in reality a statement by [the University] of its unwillingness to consider the issue." Randolph-Shepherd, 795 F.2d at 106. The facts alleged by plaintiff may show that Rutgers was unwilling to proceed as quickly as Fisher wanted and, indeed, as quickly as it was contractually required to do. However, plaintiff's claims do not support a contention that defendants were dragging out the proceedings in the hope of never having to consider them at all. To the contrary, defendant has submitted unrebutted evidence indicating that it was prepared to commence the hearing on October 24, 1989, and continue it in the following month if necessary. In the absence of any evidence supporting plaintiff's contention that defendant

never intended to review her grievance, the court finds that plaintiff has failed to raise a material issue concerning the futility of resort to the administrative process. Accordingly, the court will grant defendant's motion to dismiss plaintiff's claims in Count VII for failure to exhaust the administrative remedies afforded by the Article X grievance procedure.

In Count VIII of her complaint, plaintiff alleged that the conduct underlying her other claims constituted a breach of "the implied covenant of good faith and fair dealing in the contractual and employment relationship between plaintiff and defendant." Complaint ¶ 25. As her moving papers state, Fisher alleges that "Rutgers breached the implied covenant by violating numerous provisions of the collective bargaining

agreement and its regulations."

Plaintiff Opp. at 45. However, the collective bargaining agreement states that all such claims are subject to the grievance procedure defined in Article X:

> A grievance under Article X is an allegation that, in an evaluation which resulted in failure to award reappointment, promotion and/or tenure, there occurred a material procedural violation of 1) the Academic Reappointment/Promotion Instructions . . . and/or 2) this Agreement, and/or 3) a University Regulation or an established practice of the University related to reappointment or promotion. . . . A violation within the meaning of this Article also takes place when the action taken pursuant to 1), 2), or 3) above is arbitrary or capricious, based on personal prejudice against the grievant and/or based on discrimination . . .

Ambrose Aff., Ex. 7 at 22.

To the extent that such claims may be brought as a grievance under Article X, they are subject to the exhaustion

requirement discussed above. The court does not find any basis in law or logic for permitting plaintiff to circumvent the exhaustion requirement by redefining the identical claims as breaches of the implied warranty of good faith. Accordingly, the court will dismiss plaintiff's claims in Count VIII on the same basis that Count VII was dismissed, for failure to exhaust administrative remedies in the absence of any colorable showing of the futility of attempting to do so.

Due Process

In her Ninth Count, plaintiff claims that defendant's conduct violated her right to due process pursuant to the Fifth and Fourteenth Amendments of the United States Constitution. In the context of faculty employment at public

institutions of higher education, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, 408 U.S. 554 (1972). Plaintiff asserts a property interest as the basis for her due process claim. Under Roth, a protected property interest only exists if there is a "legitimate claim of entitlement," and not merely a unilateral expectation. Roth, 408 U.S. at 577.

No case brought to the attention of this court applies Roth in the context of a reappointment decision. However, several courts have regarded Roth as entailing that no property interest exists in a tenure promotion, where the university-employer retained discretion in making tenure appointments and where

no state statute, university rule or policy secured an interest or created a claim to continued employment. Thus, in Beitzell v. Jeffrey, 643 F.2d 870, 875-76 (1st Cir. 1981), the appellate court held that the tenure criteria at issue, of teaching, scholarship, and service, merely reiterated traditional standards for academic promotion and gave rise to neither "objective standards creating an automatic right to tenure" nor a reasonable expectation of a tenure grant. The Beitzell court observed that the educational function of a university requires a wide range of discretion in making tenure awards and calls for the exercise of subjective judgment concerning the qualifications of the candidate and the needs of the university community.

Similarly in Goodisman v. Lytle, 724

F.2d 818, 820-1 (9th Cir. 1984), the court found that the specification of substantive criteria to be employed in the tenure decision process, such as ability in teaching or research, respect from colleagues and service to the University, did not so constrain the University's discretion as to create a constitutionally-protected interest. Within the Third Circuit, a district court rejected the challenge of former Rutgers professors to their denial of tenure on the same grounds. Varma v. Bloustein, 721 F. Supp. 66 (D.N.J. 1988), aff'd, 860 F.2d 1075, cert. denied, 489 U.S. 1014 (1989). In Varma, the court found that Rutgers' promotion guidelines merely "set forth general standards of excellence in teaching, scholarship and research, professional activity, and usefulness to the University that would

be common to any tenure evaluation process at a major academic institution." Id. at 70. Another statement issued by the University of academic promotions stated that "advancement to a higher rank is not automatic," that promotion requires the exercise of subjective judgment, and that the educational needs of the University are a factor considered in awarding tenure. Based on this evidence of the basis for the tenure review process, Varma concluded that the Rutgers professors had no protected property interest in receiving an award of tenure.

The University regulations and policies to which plaintiff refers as the basis for her claimed property interest in reappointment are, in large part, precisely the same regulations and policies found in Varma to establish no

such property interest. Paragraph 3.30 of the University statutes states that:

> Promotions to higher ranks may be made in recognition of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general usefulness to the University. The weight to be given to each of the factors will be determined in the light of the duties required and to be required of the appointee.

University Policies on Academic Appointments and Promotions (Hosford Aff., Ex. 14, at 3). This court agrees with Varma that "the guidelines set forth in Regulation 3.30 . . . [do] not provide the significant substantive restrictions on University discretion in tenure appointments required to create a protected property interest." 721 F. Supp. at 70. The criteria described in Regulation 3.30 allow wide range for discretion in their application, and the

University Promotion Policy states that "subjective judgment" will play a role in promotion decisions.

The University Promotion Policy recognizes a difference between tenure and reappointment decisions: "[t]here is probably something rather different in kind as well as in quality to be sought in an associate [tenured) professor as distinct from an assistant [reappointed] professor." Policy at 9. However, the court does not find that this difference alters the analysis, nor that there is anything in defendant's policy or regulations suggesting that the reappointment decision is either automatic or narrowly constrained by objective criteria. To the contrary, Regulation 3.30 and the decision-making process described in the University Promotion Policy manual apply to tenure

and reappointment decisions without distinction. Further, the policy manual states, with regard to reappointment, that:

> The [initial] term is limited because the promise may not be fulfilled or because the University may not be in a position to reappoint even a satisfactory assistant professor. It is ordinarily the policy of the University not to appoint an assistant professor for a second term unless there is reasonable expectation that at the end of that time there will be opportunity for further promotion . . .

Id. at 10. The court finds that defendant's enunciated policy and regulations governing the reappointment decision explicitly informed plaintiff that her reappointment would be discretionary, subject to both subjective evaluations and the needs of the university, apart from the merits of her own case. Accordingly, the court

concludes that plaintiff had no "legitimate claim of entitlement" to reappointment, Roth, 408 U.S. at 577, and hence the requirements of procedural due process do not apply to defendant's denial of her application for reappointment.

Plaintiff contends that the argument that she lacks a liberty interest in reappointment ignores the fact that defendant allegedly repeatedly violated its own policies and procedures. However, as the Varma court made clear, arguments that the University did "not properly consider the promotion criteria or follow the correct procedures in evaluating candidates" is irrelevant to the issue at hand:

> the question before the court is not whether the [reappointment] decisions of the University are correct; . . . The question presented here

> is whether a protected property interest in tenure has been created.

Varma, 721 F. Supp. at 71. Defendant's alleged procedural violations, if they occurred, do not establish a due process violation in the absence of a showing that a protected liberty or property interest was at stake. Accordingly, plaintiff's Ninth Count, claiming due process violations of the Fifth and Fourteenth Amendments, will be dismissed.

Violation of New Jersey Public Policy

In the Eleventh and final Count of her complaint, plaintiff alleges that her nonreappointment, salary level, and nonhiring at GSM were in violation of the public policy of the State of New Jersey, and that she is therefore entitled to damages. Under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72

(1980), a plaintiff must identify a "clear mandate of public policy" in order to have a cause of action for wrongful discharge. However, courts will not entertain a separate common law action for wrongful discharge where specific statutory remedies for the same alleged injuries are available. See Pierce v. New Process Co., 580 F. Supp. 1543, 1546 (W.D. Pa. 1984), aff'd, 749 F.2d 27 (3d Cir. 1984); Helman v. AMF, Inc., 675 F. Supp. 1163 (S.D. Ind. 1987). Accordingly, because Title VII, the ADEA, and the New Jersey Law Against Discrimination afford available remedies for plaintiff's cause of action for alleged sex and age discrimination, a pendent common law claim for violation of public policy cannot be maintained. See Reeder-Baker v. Lincoln National Corp., 644 F. Supp. 983 (N.D. Ind. 1986).

However, plaintiff also alleges that Rutgers' decision not to rehire her was taken in part in retaliation for her having exercised her First Amendment rights and that this represents an independent violation of public policy. Even where an individual does not have a right to continuing employment, a public employer's decision not to rehire or to discharge may not be based cn the employee's exercise of constitutionally protected First Amendment freedoms. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 283-284 (1977). As the United States Supreme Court has held, a balance must be struck between the interests of a public employee as a citizen to comment upon matters of public concern and the interest of the particular governmental agency in promoting the efficiency of the public services it performs through its

employees. Pickering v. Board of Education, 391 U.S. 563, 568 (1968). However, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary." Connick v. Myers, 461 U.S. 138, 146-47 (1983).

Fisher alleges that her evaluation in the "General Usefulness" category was lowered because the category included consideration of her service on the Teaching Development Committee, and, in that capacity, she espoused unpopular views, denouncing the classroom visitation policy, the required heavy teaching loads, the limited resources available to the FASN business faculty,

the changing of grades without their consultation, and the University grading policy. Further, she claims that her "Teaching Effectiveness" rating was lowered because it was based on student evaluations, and that she had prompted complaints about her teaching by instituting disciplinary action against students cheating in her classes. Defendant contends that by her own admission, plaintiff's speech related solely to internal departmental affairs, not to matters of public interest or policy, and hence even had she been denied reappointment because of it, she would have no cause of action for violation of public policy.

The court need not reach the question of whether the issues allegedly raised by plaintiff to the Teaching Development Committee are matters of

public concern implicating First Amendment values under the Pickering analysis. For, assuming that they do involve matters of public concern, the court would dismiss plaintiff's public policy claims on a different ground: plaintiff has submitted no competent evidence that would reasonably support an inference that her espousal of unpopular views had any affect on her reappointment evaluation. Fisher has merely asserted that she received a low score in a category including consideration of the role in which she expressed those views. In fact, Fisher received a "below average" rating in General Usefulness only in her evaluation by the Appointment and Promotions Committee, the intermediate reviewing body. Both the Department Personnel Committee and Dean Hosford, the first and final stages of

the review process, gave Fisher an average rating for General Usefulness. Hosford Aff., Ex. 23 Forms. No. 4-6. The Department Personnel Committee supported its rating by observing that Fisher had "served on the Teaching Development Committee." Id., Form No. 4. Hosford wrote that "[t]aken altogether, and considering the fact that the candidate was on FASP leave and away from campus for a year, the evidence of involvement and contribution to the academic community is sufficient." Id., Form No. 6. Further, Hosford averred that "given the lesser importance of [the] criterion" of the category of General Usefulness, Fisher's average ranking in it "did not provide a counterbalance to plaintiff's deficient record in scholarly or creative activity and research accomplishments." Hosford Aff. ¶ 58.

Thus, defendant has proffered legitimate reasons for its evaluation of plaintiff in the General Usefulness category, demonstrated that plaintiff was not ranked below average in this respect in her final evaluation by Dean Hosford, and submitted evidence supporting the view that her rating in this category had, in any event, little impact on the reappointment decision. In the face of this showing plaintiff has produced nothing but unsupported speculation. In particular, plaintiff has produced no evidence from which a trier of fact could infer either that defendant harbored ill will against Fisher for her comments to the Teaching Development Committee or that its employment decisions were based in any way on comments made by Fisher to that committee. The "mere existence of a scintilla of evidence in support of the

plaintiff's position will be insufficient" to defeat a motion for summary judgment, where "reasonable jurors" could not "find by a preponderance of the evidence that the plaintiff is entitled to a verdict." Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986). Much less will a motion for summary judgment be denied where, as here, plaintiff has provided not even a scintilla of evidence, but raised merely metaphysical doubts about the legitimate reasons proffered by a defendant for its reappointment evaluations and employment decisions.

Similarly, the court also finds that plaintiff's allegation that she suffered First Amendment retaliation by virtue of her decision to report student plagiarism fails to state a claim for violation of New Jersey public policy. Plaintiff does

not claim that defendant failed to reappoint her in retaliation for reporting the plagiarism, but merely that defendant relied on the baseless criticisms of third parties whose adverse assessment may have been motivated by retaliation. Defendant has submitted unrebutted evidence that it did not rely on these potentially tainted student evaluations.[16] Further, the majority of her reviewers at every level ranked Fisher's Teaching Effectiveness as average. Hosford Aff., Ex. 23, Forms No. 4-6. Explaining its ranking, her department committee stated that student

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16. Fisher's Department Personnel Committee Evaluation states that "[t]he Department understands that assessment provided by students who have been accused of cheating may be totally misleading. We reviewed the student assessments with that in mind. . . ." Fisher Reappointment Packet, Form 4 (Hosford Aff., Ex. 23).

assessments that her courses were of below average difficulty were "puzzling in view of Professor Fisher's view that students are very poorly prepared for the courses." Id., Form No. 4. While noting her "serious concern for student learning," Hosford stated that "it is not clear that Dr. Fisher has set sufficiently demanding standards for her courses or that she has developed fully effective teaching strategies for the students this institution serves." Id., Form No. 6.

Thus, the court concludes that defendants have proffered unrebutted legitimate reasons for their ranking of plaintiff's Teaching Effectiveness, and, in the face of plaintiff's unsupported claims of bias, have submitted admissible evidence that any adverse student reviews resulting from plaintiff's reports of

student plagiarism did not taint defendant's evaluation. Plaintiff's claims of retaliation are rendered further incredible in view of the fact that she did not receive a below average rating for teaching ability. Finally, even assuming that defendants had relied on student recommendations motivated by retaliation, the court finds no basis for deeming this a violation of plaintiff's First Amendment rights, even if it represented a flawed evaluative process, absent any allegation that defendant refused to reappoint plaintiff because she reported the plagiarism. Accordingly, the court will dismiss Fisher's public policy claims in their entirety.

Conclusion

For the foregoing reasons,

defendant's motion for summary judgment will be granted, and plaintiff's claims will be dismissed in their entirety.

H. LEE SAROKIN, U.S.D.J.

Date: August 5, 1992

Original to: Clerk, U.S. District Court

Copies to: Joel A. Pisano,
U.S. Magistrate Judge

Aron M. Schwartz, Esq.
Vogel, Chait, Schwartz and Collins
77 Headquarters Plaza
North Tower
Morristown, NJ 07960

Stephen J. Edelstein
Schwartz, Simon & Edelstein
293 Eisenhower Parkway
Suite 300
Livingston, NJ 07039

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LOIS A. FISHER,	:	Civ. No. 90-503 (HLS)
Plaintiff,	:	ORDER
vs.	:	
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,	:	
Defendant.	:	

This matter having come before the court upon defendant's motion for summary judgment; and the court having considered the submissions of the parties and the arguments of counsel; and for the reasons expressed in the accompanying opinion; and for good cause shown,

It is on this 5 day of August, 1992, hereby

ORDERED that defendant's motion for summary judgment be and hereby is

granted; and it is further

ORDERED that this matter be and hereby is dismissed.

H. LEE SAROKIN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5473 and 92-5497

LOIS FISHER

v.

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY

Lois A. Fisher
Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and SEITZ

Circuit Judges

The petition for rehearing filed by appellant in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: July 13, 1993

SUPREME COURT OF THE UNITED STATES

NO.

A-152

Lois Fisher,

Petitioner

v.

Rutgers, State University of New Jersey

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 22, 1993.

/S/ David H. Souter
Associate Justice of the
Supreme Court of the United
States

Dated this 17th
day of August, 1993.

Supreme Court, U.S.
FILED
NOV 24 1993
OFFICE OF THE CLERK

No. 93-642

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LOIS A. FISHER,

Petitioner,

v.

RUTGERS, THE STATE
UNIVERSITY OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, IN OPPOSITION

JOHN B. WOLF
Rutgers, The State
University of New
Jersey
New Brunswick, NJ 08903

ARON M. SCHWARTZ*
VOGEL, CHAIT, SCHWARTZ
AND COLLINS
A Professional Corporation
77 Headquarters Plaza,
North Tower
Morristown, New Jersey 07960
(201) 538-3800
**Counsel of Record*

November 24, 1993

Washington, D.C. • THIEL PRESS • (202) 328-3286

QUESTIONS PRESENTED

1. In the absence of any conflicting decisions of the Courts of Appeals, should this Court review the settled method of summary judgment adjudication in employment discrimination cases, namely, that an employment discrimination plaintiff must produce evidence of pretext in order to survive a defense summary judgment motion?

2. Is there any need for this Court to exercise its supervisory powers where the District Court granted summary judgment to respondent after thoroughly examining the record for evidence of pretext (granting all favorable inferences to plaintiff), where the panel of the Court of Appeals affirmed the grant of summary judgment without opinion, and where the full Court of Appeals denied petitioner's petition for an *en banc* rehearing without dissent?

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ARGUMENT

The District Court Decision And Its Affirmance By The Court of Appeals Do Not Conflict With The Decisions of Any Other Courts of Appeals Or With Any Decisions of This Court. Since The Decisions Below Follow Settled Law, This Case Neither Presents An Important Question of Federal Law Not Yet Decided By This Court Nor Calls For The Exercise of This Court's Supervisory Powers. 19

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Court Rules:

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No. 93-642

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LOIS A. FISHER,

Petitioner,

v.

RUTGERS, THE STATE
UNIVERSITY OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

In this employment discrimination case, petitioner contends that the decision by Rutgers University not to appoint her to a second three-year term as an assistant professor was due to discrimination on the basis of age

and sex. By opinion and order of August 5, 1992, the District Court granted respondent's motion for summary judgment on the ground that petitioner had not produced evidence from which a trier of fact could reasonably infer that the University's reasons for not reappointing petitioner were pretext for unlawful discrmination. The Third Circuit Court of Appeals affirmed the District Court without opinion. Petitioner's petition for rehearing *en banc* was denied by the full Court without dissent.

II. FACTS

A. Background

The Faculty of Arts and Sciences – Newark (hereafter, "FASN") is one of several separate academic units located at Rutgers' Newark campus.[1] FASN offers undergraduate business education through a Department of Business Administration. At all relevant times in this case, Norman Samuels was the provost of the Newark campus and David Hosford was the dean of FASN.[2]

A dean has overall responsibility for personnel administration of his or her academic unit. One of the major responsibilities of a dean is continually to seek to improve the quality of the faculty.

At Rutgers, the faculty search and recruitment function is carried out by the faculty in the academic departments who recommend the final candidate to the dean of the academic unit. If the dean is in agreement, the dean will forward his or her recommendation to the provost.

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[1] Rutgers University has three main campuses: New Brunswick, Newark, and Camden, each of which houses various academic units – *i.e.*, schools, faculties and institutes.

[2] The provost is the chief academic and administrative officer of the campus. Each academic unit is headed by a dean or director.

The University's principal objective in faculty hiring is to hire the best faculty at the best (*i.e.*, lowest) price. However, not all disciplines and fields command the same salary. For example, as compared to the humanities (where there has been little if any competition from the private sector), the University frequently must pay a premium to attract high quality faculty in many of the sciences, engineering, and business areas due to competition created by private industry.

B. The Hiring of Petitioner at FASN and Establishment of Her Salary

A salary range of $30,000 to $35,000 for petitioner's position was fixed by Provost Samuels and Dean Hosford before petitioner was known to be a candidate for the position. (Pet. App. 62a) The proposed salary range from $30,000 to $35,000 squared with their respective perceptions of the market for an assistant or associate professor of management in the undergraduate business department at FASN.[3]

The persons involved in petitioner's hiring had reservations about her qualifications for a faculty position in organization management. After reviewing petitioner's resume, in early March 1985, Associate Dean Stanley Kaish questioned whether her doctoral degree (which was in higher education) and her dissertation (which dealt with a study of legislation pertaining to higher education in four states) were suitable background for an assistant professor of organization management.

Following some further communication from petitioner, Associate Dean Kaish ultimately was persuaded

[3] At the time, the market was such that prospective organization management faculty commanded a considerably lower salary than other business fields such as finance or accounting.

that petitioner probably could begin a program of research and scholarship appropriate to the field of organization management and was satisfied that her appointment would meet accreditation standards. Associate Dean Kaish also understood that petitioner was going to attend a "Careers in Business Program" at New York University during the summer of 1985. This summer course was designed to orient persons with non-business doctorates to business subjects.[4] Although Associate Dean Kaish recommended to the FASN Appointments and Promotions ("A & P") Committee[5] that petitioner be appointed as Assistant Professor of Management effective September 1985, the A & P Committee recommended petitioner's appointment "with reservation . . . ."

Dean Hosford considered petitioner's doctoral studies (in the field of higher education) to be marginally related to organization management, was concerned about her limited experience teaching organization management courses, and believed that petitioner's areas of research did not fall within the discipline of organization management in particular or business in general. (Pet. App. 63a) Nevertheless, Hosford thought that, with her social science background (including some work in organizational psychology), petitioner might be able to make the transition into organization management. Helping to tip the scales in favor of hiring petitioner was the fact that Dean Hosford had become aware that petitioner's hus-

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[4]This was not a program of "post-doctoral" studies in petitioner's field, as petitioner suggests. Her field was higher education and the program was designed to orient non-business Ph.D.'s to careers in business.

[5]The A & P Committee consisted of four tenured FASN faculty members. The A & P Committee had certain responsibilities regarding the appointment, reappointment, and promotion of faculty at FASN.

band was a highly regarded faculty member at the University's Graduate School of Management (GSM).[6]

When Dean Hosford recommended the hiring of petitioner, he fixed her salary at $30,033 which was within the pre-established range for her position. His decision to offer a salary of $30,033 was based on his understanding of the market for someone with petitioner's limited credentials in the business field. (Pet. App. 63a)

Provost Samuels had reservations similar to Dean Hosford's about petitioner's qualifications. Although the Provost approved petitioner's hiring, he conveyed his concerns in writing by reminding Dean Hosford of the importance of emphasizing to petitioner the need for publication "in her adopted area" for purposes of continued employment. Provost Samuels approved petitioner's hiring because he was aware that others with doctorates in other fields had successfully made a transition to a business discipline and believed that petitioner might have the potential to do so. (He, too, was aware of petitioner's husband's status at GSM.)

In his April 16, 1985 letter offering petitioner an appointment as an Assistant Professor in the FASN Department of Business Administration for an initial three year probationary term, Dean Hosford "strongly encourage[d] . . . [petitioner] to discuss with Dr. [Jerry] Rosenberg [then Department Chair] plans for developing a full program of research in the field of management." Dean Hosford also informed petitioner that "[b]oth the University Regulations and the AACSB [American Association of Collegiate Schools of Business] standards require a track record of significant scholarship in the field of specialization signified by your appointment."

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[6] GSM houses the University's graduate programs in business.

Petitioner admittedly was well aware of the "culture of the academy" at a research institution – *i.e.*, publish or perish. In addition, both before and after petitioner was hired, Associate Dean Kaish emphasized to her the importance and necessity of embarking on a program of scholarship and research in the management field.

C. Petitioner's Scholarly/Creative Activities and Research Accomplishments.

Despite Dean Hosford's advice in petitioner's appointment letter and despite subsequent direction from the Department Chair, petitioner never really moved ahead with a management-related research program. All of the documentary evidence showed that petitioner foundered in that respect and did not move beyond her dissertation research. The first two and one-half years of petitioner's appointment were marked by ever-changing and conflicting research goals with meager results. (Pet. App. 30a)

As of September 1985 when petitioner began her three year appointment, she had an article entitled "The Role of Politics in the Organization and Development of Public Higher Education in Idaho and Washington" accepted for publication in the *History of Higher Education Annual.* Completed in May or June, 1985, this article was an outgrowth of petitioner's dissertation which involved a comparative study of state legislation affecting higher education from 1900 to 1979 in four states – Idaho, Washington, Tennessee, and New Hampshire.

In her October 1985 progress review, petitioner listed several "goals" with respect to management-related research.[7] Petitioner's 1986 progress and performance

[7] One such "goal" was "[c]heck out other possibilities" to extend her research interests.

reviews reflected that petitioner had done virtually nothing towards accomplishing any of the management-related research goals listed on the October 1985 progress review. In May 1986, the Department Chair gave petitioner the following written instruction as part of her progress review: "As she shifts her emphasis more into Mgt. Studies, *her goals should become more focused in business areas.*" (emphasis added)

As goals for the 1986-87 academic year (as set forth in her 1986 performance review), petitioner emphasized continuation of her attempts to publish and update her dissertation research regarding state legislation and institutions of higher education. As a *secondary* goal, petitioner specified that she would continue her research on professional collective bargaining and would "be alert to other research opportunities in the field of management and begin to explore them if time permits."

During the 1986-87 academic year, petitioner spent the vast majority of her research time in updating and extending her dissertation research with little effort devoted to management-related research such as her work concerning professional collective bargaining.

This pattern of relegating management-related research to secondary status continued with petitioner's 1987 performance review. In that review, petitioner's first goal for the 1987-88 academic year was to revise and extend a paper that was an outgrowth of her dissertation. Petitioner's second goal was to "continue her research on professional collective bargaining aimed at the eventual publication of a paper in this area." Petitioner also listed as goals the "catching up" on exploratory reading and being "alert to other research opportunities in the field of management and . . . explor[ing] if time permits."

The Department Chair's written instructions appended to the 1987 performance review included the following: "As discussed, it is important for her to concentrate her energies in 'bridge-building' so as to generate enthusiasm for her as a solid professor of management." In response to these comments, petitioner affirmed that she ". . . will be aiming at publication in management-oriented journals."

In her application for a sabbatical during the 1987-88 academic year, petitioner stated that most of her leave time "would be applied to . . . the study of professional collective bargaining" and recognized that pursuit of this research was ". . . necessary for the continuation of [her] academic career." Despite these statements, while on leave petitioner switched her focus to the extension of her dissertation research and did virtually nothing in the area of professional collective bargaining or any other management-related research.

D. Reappointment Evaluation Procedures and Criteria.

The first step in the reappointment process is the listing of the candidate's credentials. In addition, the candidate is free to submit any other materials (such as articles, papers, manuscripts) which he or she wishes to have considered. Next, the candidate is reviewed by his or her Department Committee which consists of tenured faculty in the Department at or above the rank for which the faculty member is being evaluated. The department chair ordinarily completes a separate Chair's Summary Statement unless there are three or fewer faculty eligible and present (including the department chair) to make up the Department Committee. In that instance, the department chair participates as a member of the Department Committee and does not complete a separate Chair's Summary Statement.

The next step is evaluation by the A & P Committee of the academic unit. After that, the dean of the academic unit evaluates the candidate and forwards his or her recommendation to the campus provost. On reappointment evaluations not involving tenure, the campus provost has the final authority.

At each level, a written evaluation is prepared and forwarded to the next level of review. The evaluations from the prior levels, together with the candidate's credentials, comprise the candidate's promotion packet. Any supplementary materials submitted by the candidate also accompany the promotion packet through the various levels of review.

With respect to assistant professorships, the University policy states:

> Assistant professorships ordinarily carry three-year terms which are *probationary*. The university has indicated, by appointment or promotion to an assistant professorship, some measure of confidence in the likelihood of a person's continuing growth. The term is limited because the promise may not be fulfilled or because the university may not be in a position to reappoint even a satisfactory assistant professor. It is ordinarily the policy of the university *not to appoint an assistant professor for a second term unless there is reasonable expectation that at the end of that time there will be opportunity for further promotion,* if he or she has qualified. In case of doubt, appointments for one- or two-year terms may be made. [emphasis added] [Pet. App. 91a]

Candidates are evaluated under five criteria: teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general use-

fulness. (Pet. App. 89a) In an evaluation for a second three-year appointment, the evaluators look for at least a satisfactory level of performance under teaching effectiveness. Under scholarly and creative activity and research accomplishments, the evaluators look to see if the candidate is on a trajectory that will likely lead to a record of accomplishment sufficient to support an award of tenure three years hence. Professional activity and general usefulness ordinarily carry little weight in reappointment evaluations not involving tenure.

If a candidate's record is deficient, nonreappointment is the better practice. In this way, the University will be in a position to seek to improve the qualify of its faculty by going out into the market to seek a more promising person.

E. Petitioner's Reappointment Evaluation.

Petitioner's credentials listed only one published refereed article – which appeared in 1985 in the *History of Higher Education Annual* (1985). Petitioner also listed another article as being in press with the *Journal of Higher Education* and scheduled for publication in March or April 1988. Petitioner had no other published articles, articles in press or articles on review with any refereed journals. Perhaps more significantly, *petitioner had no articles published, accepted, or on review with any management journals* as opposed to higher education journals. (Pet. App. 22a) Petitioner even acknowledged, in her statement regarding research appended to her reappointment packet, that:

> Thus far, *my publications have appeared only in higher education journals. I am now concentrating my publication efforts on management journals*

and on professional contacts in the management field . . .[8]

(emphasis added)

As recorded on its written evaluation, the unanimous view of the Department Committee was that petitioner's "record is not likely to lead to tenure. On that basis we believe that reappointment is not warranted."

Under the criterion of teaching effectiveness, the Department Committee noted their puzzlement over what they perceived to be a contradiction between petitioner's expressed view that students were very poorly prepared for her courses and the students' perception (gleaned from student evaluations) that petitioner's courses were relatively easy. (Pet. App. 32a-33a) One Department Committee member had also received a substantial number of negative comments from students regarding petitioner's teaching.[9]

With respect to scholarly/creative activity, the Department Committee noted in their written evaluation that petitioner's one published article and the one in press were based on her doctoral dissertation relating to the history of state laws dealing with higher education and further noted their opinion that the quality of the papers was marginal. The Department Committee pointed out that petitioner had not published in refereed journals in the management field and that the level of output was disappointing in terms of both quantity and quality. The

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[8]Petitioner effectively ignored Dean Hosford's and Professor Rosenberg's advice regarding the need for her to engage in and develop a program of management-related research.

[9]Under teaching effectiveness, two members of the Department Committee rated petitioner as average and one member rated her as below average.

Department Committee also commented that petitioner's current research goals envisioned primarily additional papers based on her doctoral dissertation. Finally, the Department Committee stated their belief "that the probability of simultaneous improvement in both quantity and quality that would be necessary for a favorable tenure decision is remote."

The unanimous view of the A & P Committee was that petitioner's packet did not disclose anything which suggested that the Department Committee's assessment and its ultimate recommendation against reappointment was misguided or otherwise suspect. The A & P Committee saw that petitioner had not made any measurable progress in advancing beyond her dissertation into new areas of scholarship and research and questioned whether petitioner's publications were related to the management field. In the collective view of the A & P Committee, petitioner's deficiencies in scholarly/creative activity and research accomplishments could not support a recommendation in favor of reappointment. The A & P Committee commented: "In no category has the candidate demonstrated satisfactory progress towards the required standards for tenure."

Dean Hosford rated petitioner as average under teaching effectiveness, taking note of the Department Committee's observations and recalling that petitioner had complained to him about the quality of her students. (Pet. App. 102a) This rating was sufficient to meet the threshold of minimally satisfactory performance under that criterion.

Dean Hosford considered the state of petitioner's scholarship and research against the background of his admonition to her in his initial letter offering her an appointment – that she should develop a program of

scholarship and research in the field of organization management. Dean Hosford concluded that there was a marked lack of evidence that petitioner was on track towards establishing a tenurable record of scholarship and research in the organization management field. Although it was and is common for faculty to derive articles from their dissertations, Dean Hosford nevertheless expected that a person in his or her third year, who had already enjoyed a full semester of a one year sabbatical leave, would have demonstrated tangible evidence of growth in scholarship and research beyond the dissertation. In Dean Hosford's view, evidence of this was plainly lacking in petitioner's packet.[10]

Ultimately, Dean Hosford concluded that, given the relative lack of difficulty in recruiting organization management faculty and given his continuing responsibility to improve the quality of the faculty, the obvious decision was to recommend against reappointment of petitioner and to go back into the market for an organization management faculty member.

Provost Samuels viewed petitioner's record under the criteria of scholarly/creative activity and research accomplishments as seriously deficient. He noted that petitioner had had only one article published in a refereed

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[10] Dean Hosford looked to see if plaintiff had substantial work "in the pipeline." However, since petitioner did not submit any of the materials which she listed under "Work in Progress," neither Dean Hosford nor the other evaluators had anything to review in that respect. Moreover, Dean Hosford noted that two of the items listed as Work in Progress were in the most preliminary stages – petitioner described them as "third replication under consideration" and "exploratory work for further study." The titles of the other two items listed under Work in Progress indicated to Dean Hosford that they were further derivations from petitioner's dissertation in the field of higher education.

journal (which was completed and accepted for publication before she was hired in September 1985) and one in press. He also questioned whether petitioner's publications were in the management discipline. Provost Samuels did not see in petitioner's reappointment packet any appreciable scholarship or research beyond her dissertation. In assessing petitioner's work in progress, Provost Samuels noted that petitioner had nothing either submitted to or on review with refereed journals in the field of management.[11]

Provost Samuels viewed petitioner's reappointment candidacy against the need to improve the quality of the faculty in the FASN Business Administration Department faculty. In the Provost's view, given the plain deficiencies in petitioner's record, given the relative lack of difficulty in recruiting organization management people as compared with some of the other business disciplines, and given the fact that petitioner was hired as a "gamble" of sorts since she had neither a degree nor experience in a business field, the better course was not to reappoint petitioner and to try to find somebody with more promise and better qualifications than she.

F. Reappointment Evaluation of Professor Mark Castelino.

Petitioner's primary comparator, Mark Castelino (an Assistant Professor of Finance in the FASN Business Administration Department) began employment at Rut-

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[11] In the Provost's view, the fact that petitioner had had a sabbatical – which is specifically designed to relieve a faculty member from teaching and administrative duties in order to devote full energies to scholarship and research – yet had such a meager record under scholarly and creative activity and research accomplishments underscored the wisdom of the Dean's evaluation and that of the other prior levels of review.

gers at the same time as petitioner and was evaluated for reappointment to a second three year probationary term at the same time as petitioner. The membership of the Department and A & P Committees that evaluated Professor Castelino was identical to those that evaluated petitioner and the exact same procedures were followed for petitioner's and Castelino's evaluations.[12]

Professor Castelino had two refereed articles published as a co-author prior to coming to Rutgers. After coming to Rutgers and up to the time of his reappointment evaluation, Professor Castelino had an additional article published in a refereed journal as a co-author in 1987, had another article in press in a refereed journal as co-author, had three additional articles on review at refereed journals (one of which was co-authored and two of which were sole-authored),[13] and had three other articles in progress. All of Professor Castelino's publications were in the field of his appointment – finance. (Pet. App. 22a) He submitted as part of the supplementary materials accompanying his promotion packet all of his published articles *and his three articles on review.*

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[12] Because the exact same procedures were applied to Castelino's evaluation as to petitioner's, petitioner's claim that her evaluation involved a departure from the University's evaluation procedures is immaterial to her discrimination claim. For example, although petitioner claimed a violation of University Regulations because the Department Chair participated with the Department Committee and did not complete a separate Chair's Summary Statement, the same procedure was followed for Castelino. Whether or not this procedure departed from University Regulations is immaterial since it was equally applied to petitioner and Castelino. (Pet. App. 33a-37a)

[13] One of these articles was on second review, a strong indication that the journal viewed it favorably and had confidence that it would be published.

As to teaching effectiveness, the Department Committee noted that Professor Castelino's student ratings were uniformly favorable.

The Department Committee was persuaded that Professor Castelino was making satisfactory progress towards tenure in the areas of scholarly and creative activity and research accomplishments. The Department Committee saw Professor Castelino's publication record as average to above average in view of the usual time lags in publishing articles in finance journals. The Committee further pointed out that Castelino had three articles currently under review. In addition, the Department Committee noted that Castelino had received two grants totaling over $5,000.00 from the Coordinating Council of Business Studies[14] and that he had devoted a considerable amount of time to the development of a curriculum for a new finance major which the Department Committee viewed as a form of scholarly/creative activity. The Department Committee concluded by saying that "we anticipate that, provided he maintains current productivity levels[,] he will be able to achieve tenure" and voted unanimously in favor of Castelino's reappointment.

With respect to scholarly/creative activity and research accomplishments, the A & P Committee's consensus was that Professor Castelino was making marginally satisfactory progress towards eligibility for tenure. The A & P

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[14] This was a competitive grant program among the several business units at Rutgers – the School of Business at Camden, the School of Business at New Brunswick, GSM, and the Department of Business Administration at FASN – and was a form of positive peer evaluation of Castelino's research. (Pet. App. 31a) Petitioner and Castelino both received smaller University Research Council Grants which were commonly granted to new faculty in all disciplines and which therefore carried lesser weight in reappointment evaluations.

Committee took note of the fact that Castelino had recently published a refereed article, had another refereed article in press, and had three other articles on review with refereed journals. The A & P Committee also saw that Professor Castelino was moving beyond his dissertation. Notwithstanding these positive points, the Committee nevertheless had some reservations. As a result, the A & P Committee recommended a two year, instead of the customary three year, appointment.

Upon reviewing Castelino's packet, Dean Hosford agreed on balance with the A & P Committee's recommendation for a two year reappointment. In Dean Hosford's view, while Professor Castelino had already published several articles and had a reasonable amount of work in the pipeline including three articles (two of which were sole-authored) on review with refereed finance journals, and was moving beyond his dissertation into new areas, he still needed to make a more concentrated effort leading to concrete results in order to have a tenurable record in three years' time. It was Dean Hosford's thinking that the best way to send this message was by means of a two year reappointment. Dean Hosford viewed Castelino's candidacy as one of those "cases of doubt" warranting a two year rather than a three year reappointment.[15]

Provost Samuels took note of Professor Castelino's publication record but, more importantly, saw that Professor Castelino had three additional articles on review with refereed journals in the field of finance. With Castelino's recent articles being sole-authored, his record in scholarly and creative activity and research accomplish-

[15] An additional factor bearing upon Dean Hosford's evaluation of Castelino was the difficulty in recruiting finance faculty.

ments suggested to Provost Samuels that he had an active research program which was producing results. However, the Provost, like Dean Hosford, was persuaded that the two year reappointment was the better course.

SUMMARY OF ARGUMENT

The recent decision of this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. ___ , 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) has not altered the landscape for deciding summary judgment motions in Title VII cases and ADEA employment discrimination cases. If, after a defendant articulates legitimate, non-discriminatory reasons for a challenged employment action, the plaintiff does not produce evidence from which a fact-finder may reasonably infer pretext, summary judgment should be granted to the defendant.

This Court and the lower federal courts have long been mindful of the need to exercise care in reviewing, and to avoid second-guessing, academic judgments in various contexts including faculty employment discrimination cases. *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 198 n.6 (1990) The courts have uniformly held that, to establish pretext in such cases, a plaintiff needs to show more than a mere disagreement about the credentials of faculty members. *E.g., Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir.), *cert. den.*, ___ U.S. ___ , 1991); *Molthan v. Temple University*, 778 F.2d 955, 963 (3d Cir. 1985); *Zahorik v. Cornell University*, 729 F.2d 85, 94 (2d Cir. 1984). Although the District Court and Court of Appeals followed these principles in granting and affirming the University's motion for summary judgment, petitioner is asking this Court to discard these settled precedents even

though no conflict in the circuits exists. This Court should reject petitioner's invitation to depart from settled doctrine and decline to issue a Writ of Certiorari.

ARGUMENT

THE DISTRICT COURT DECISION AND ITS AFFIRMANCE BY THE COURT OF APPEALS DO NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURTS OF APPEALS OR WITH ANY DECISIONS OF THIS COURT. SINCE THE DECISIONS BELOW FOLLOW SETTLED LAW, THIS CASE NEITHER PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET DECIDED BY THIS COURT NOR CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 24 (1981), this Court established the now-familiar three-step allocation of the burdens of proof and production in employment discrimination cases. First, upon introducing evidence of a *prima facie* case of discrimination, a plaintiff establishes a presumption that discrimination was the motivation for the challenged action. The defendant then has the opportunity to come forward with legitimate, non-discriminatory reasons for the employment decision. This is a burden of production, not persuasion. If the defendant articulates legitimate, non-discriminatory reasons, the presumption of discrimination drops from the case. To prevail, the plaintiff must show that the defendants' reasons were pretext *for unlawful discrimination*. *Hicks, supra*, 509 U.S. at ___ . As a practical matter, plaintiffs often introduce evidence of pretext on their case in chief, anticipating the defendant's reasons. Evidence of pretext also may be offered by way of rebuttal.

Following this Court's decisions in *McDonnell Douglas* and *Burdine*, it has become settled law that summary judgment should be granted to a defendant in an employment discrimination case where the defendant comes forward with legitimate, non-discriminatory reasons and the plaintiff fails to produce evidence from which the trier of fact may reasonably infer that those reasons were pretext for unlawful discrimination. Every circuit in the country has so held. *Villanueva, supra*, 930 F.2d at 127 (1st Cir.) (Title VII); *Zahorik, supra*, 729 F.2d at 93-5 (2d Cir.) (Title VII); *Fowle v. C & C Cola*, 868 F.2d 59, 61-62 (3d Cir. 1989) (ADEA); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 234-35 (4th Cir. 1991) (ADEA); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815-17 (5th Cir. 1993) (ADEA); *Mitchell v. Toledo Hospital*, 964 F.2d 577, 584-85 (6th Cir. 1992) (Title VII and ADEA); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 281-82 (7th Cir. 1985) (Title VII); *Richmond v. Board of Regents of Univ. of Minn.*, 957 F.2d 595, 598 (8th Cir. 1992) (Title VII and ADEA); *Lindahl v. Air France*, 930 F.2d 1434, 1437-38 (9th Cir. 1991) (Title VII and ADEA); *McDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1121-22 (10th Cir. 1991) (ADEA); *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987).

Contrary to petitioner's suggestion, *Hicks* does not require re-examination of Title VII or ADEA jurisprudence applicable to summary judgment motions. In *Hicks*, the question was whether a Title VII plaintiff, who had presented evidence sufficient to establish a *prima facie* case, automatically prevails upon proving that the defendant's asserted reasons were pretext. The Court held that showing pretext was not enough; rather, the plaintiff could not prevail unless the trier of fact also

was persuaded that discrimination motivated the challenged action.

Petitioner seeks to latch onto statements in *Hicks* that the presumption of discrimination created by the establishment of a *prima facie* case drops from the case once a defendant articulates legitimate, non-discriminatory reasons. Petitioner suggests that this means that all employment discrimination cases must be tried so long as the plaintiff has established a *prima facie* case. However, *Hicks* did not break any new ground insofar as it held that the presumption of discrimination drops from the case once a defendant comes forward with non-discriminatory reasons. That has been settled law for some time. *See, United States Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 714-15 (1983); *Burdine, supra*, 450 U.S. at 254-55. With that rule as a backdrop, every circuit has held that summary judgment is appropriate where a plaintiff does not produce evidence of pretext even where the plaintiff has evidence sufficient to establish a *prima facie* case. (See cases cited on p. 20, above.)

Hicks, of course, was decided after a full trial. In *Hicks* no question was presented to this Court or the courts below as to whether summary judgment is appropriate in Title VII cases where a plaintiff has not produced any evidence of pretext. The only issue in *Hicks* was whether proving pretext compels a verdict for plaintiff.

The fallacy in petitioner's argument is that there is not necessarily an equivalency between evidence of a *prima facie* case and evidence of pretext. Evidence sufficient to establish a *prima facie* case may well be inadequate to support an inference of pretext. For example, in faculty employment discrimination cases, a plaintiff can estab-

lish the qualification prong of a *prima facie* case by showing that he or she

> was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, he need show only that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure decision-making body.

Roebuck v. Drexel University, 852 F.2d 715, 726 (3d Cir. 1988). This may be done by showing that one's credentials for promotion (reappointment in this case) were debatable – *i.e.* that there were different views among those involved in the evaluation process. *Bennun v. Rutgers State University*, 941 F.2d 154, 176 (3d Cir. 1991), *cert. den.*, ___ U.S. ___ (1992) (divergent votes of reviewers established debatability of credentials); *Villanueva, supra*, 930 F.2d at 129; *Zahorik, supra*, 729 F.2d at 93-94 (*prima facie* case "made out by showing that some significant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on the question").[16]

The same evidence – difference of opinion about a candidate's accomplishments – is, however, insufficient in and of itself to support an inference of pretext on a defense motion for summary judgment.[17] For a plain-

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[16] In petitioner's case, the evaluators at all levels of evaluation were unanimously against reappointment. The University had argued that petitioner therefore had not produced evidence of qualification for reappointment sufficient to establish a *prima facie* case.

[17] It is easy to come up with other examples where evidence sufficient to make out a *prima facie* case is inadequate to permit

[footnote continued]

tiff to succeed in a faculty employment discrimination case,

> . . . the evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university.

Zahorik, supra, 729 F.2d at 94; *accord, Villanueva, supra*, 930 F.2d at 128, 130-31; *see, Molthan v. Temple University, supra*, 778 F.2d at 963 (to prove pretext, plaintiff must show "more than a denial of promotion as a result of a dispute over qualifications"). (Petitioner has not shown the existence of a conflict among the courts of appeals on this rule either.)

In this case, there was not even any disagreement among the evaluators about petitioner's credentials. At all levels of review, there was unanimity of opinion against reappointing petitioner. Not only were the evaluators unanimous in recommending against reappointment, but also they fully agreed on the reasons for recommending against reappointment: they all felt that petitioner's record of scholarly and creativity activity and research accomplishments was sorely lacking and that

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an inference of pretext. In a hiring or promotion case, a plaintiff may prove that he or she met the minimum qualifications for the position. If the employer comes forward with evidence that the successful candidate had superior qualifications to plaintiff's, summary judgment should be entered for the employer if plaintiff is unable to produce evidence of pretext. Although faculty promotions at Rutgers are not competitive, this is largely what happened here. While the District Court inferred that plaintiff was in that "middle group" as to whom a positive or negative reappointment decision could have been justified and thus was minimally "qualified" for reappointment, it found no basis in the record to infer that the University's higher opinion of Professor Castelino's accomplishments or that its negative views of petitioner were pretext for unlawful discrimination.

it held no promise of petitioner developing a tenurable record in three years time.[18]

As it was obligated to do, the District Court thoroughly combed the record to try to find evidence that could support an inference of pretext. In doing so, the District Court construed the evidence in the light most favorable to petitioner. (Pet. App. 10a) This is standard summary judgment fare and presents no cause for this Court to exercise its supervisory powers, especially since the Court of Appeals panel saw no need to write an opinion affirming the judgment below and since the entire Court of Appeals denied petitioner's petition for rehearing *en banc* without dissent.

While petitioner goes to great lengths in her Petition to point out what she believes are differences in treatment of her and of Professor Castelino, that argument misses the point. For each instance in which petitioner claimed that she was subject to differential treatment, the University produced evidence, by way of affidavits, deposition testimony, or documents, that explained the

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[18]The year before petitioner's reappointment evaluation, Professor Rosenberg and Associate Dean Kaish recommended her for a salary increase and said that she was a "serious prospect for eventually being tenured." However, they were not involved in petitioner's reappointment evaluation and made that statement based on their generalized belief (which turned out to be â mistaken belief) that petitioner had an active program of management-related research in progress. While the District Court viewed this statement as providing some support to petitioner's establishment of a *prima facie* case (Pet. App. at 18a-19a), since neither Rosenberg nor Kaish were involved in petitioner's (or Castelino's) reappointment evaluation, the statement was immaterial to the motivation of the evaluators. *See, Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990) ("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.")

reasons for its actions.[19] After examining the entire record under the appropriate summary judgment standard, the District Court was unable to find any evidence to suggest that the University's reasons were pretext for unlawful discrimination. (Pet. App. 25a to 37a) Since petitioner did not participate in her own or Castelino's evaluations, her self-serving opinions about her scholarship and research and her argument that the evaluators' *opinions* were *mistaken* were insufficient to create a material dispute of fact regarding pretext. The District Court properly focused on the *admissible* evidence in the record to determine if evidence of pretext existed. *See*, Rule 56(e) of Fed. Rules of Civ. Pro.; *Smith v. Flax*, 618 F.2d 1962, 1066-67 (4th Cir. 1980) (plaintiff's perception of himself is not relevant; perception of the decision maker is relevant); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. den.*, 479 U.S. 1066 (1987) (plaintiff "must do more than challenge the judgment of his superiors through his own self-interested assertions"); *Clark v. Whiting*, 607 F.2d 634, 639-40 (4th Cir. 1979) (faculty employment case rejecting "I'm just as good as you are" argument).

Research has not disclosed any post-*Hicks* court of appeals decisions that have rejected the settled doctrine that requires a plaintiff to produce evidence of pretext

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[19] As the District Court found, there was no evidence to support petitioner's assertions that faculty in other departments were reappointed without any publications. While some faculty might not have published any refereed articles at the time of the reappointment evaluation, they had recognized publications such as books, chapters in books, and computer software. These other faculty also had articles *on review* with top journals in their respective fields. Petitioner had no similar accomplishments. (Pet. App. 38a to 40a)

to withstand summary judgment and that instead have embraced petitioner's novel theory that once a plaintiff produces evidence sufficient to establish a *prima facie* case, that evidence necessarily is sufficient to create a factual issue as to pretext. On the contrary, post-*Hicks* decisions have not stepped back from this settled rule. *E.g., Geary v. Visitation of the Blessed Virgin Mary Parish School*, ___ F.3d ___ , 1993 WL 390433, at *8 (3d Cir. 1993) (summary judgment granted); *Card v. Hercules Incorporated*, 5 F.2d 545 (Table) (unpublished), 1993 WL 351337, at *2-*3 (10th Cir. 1993) (summary judgment granted); *Mueller v. Greenlee Textron Inc.*, 2 F.3d 1153 (Table) (unpublished), 1993 WL 312891, at *5 (7th Cir. 1993) (summary judgment granted); *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1417-18 (10th Cir. 1993); *Reiff v. Philadelphia County Court of Common Pleas*, 827 F.Supp. 319, 324-25 (E.D. Pa. 1993) (summary judgment denied); *Dhuria v. Trustees of University of District of Columbia*, 827 F.Supp. 818, 827-28 (D.D.C. 1993) (summary judgment granted); *Robinson v. Overseas Military Sales Corp.*, 827 F.Supp. 915, 921-22 (E.D.N.Y. 1993) (summary judgment granted). Consequently, this case is not an appropriate vehicle for this Court to consider such a fundamental change in the rules applicable to summary judgment adjudication in employment discrimination cases.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ARON M. SCHWARTZ*
VOGEL, CHAIT, SCHWARTZ
AND COLLINS
77 Headquarters Plaza
North Tower
Morristown, NJ 07960
(201) 538-3800
Counsel of Record.

JOHN B. WOLF
Rutgers, The State University
of New Jersey
New Brunswick, New Jersey 08903

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NO. 93-642

LOIS A. FISHER

OCTOBER TERM, 1993

LOIS A. FISHER,

Petitioner

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER LOIS FISHER

Lawrence S. Schwartz*
Stephen J. Edelstein
SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER
293 Eisenhower Parkway
Suite 300
Livingston, New Jersey 07039
(201) 740-1600
Attorneys for Petitioner

*Counsel of Record

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I. IN ITS BRIEF IN OPPOSITION, RESPONDENT HAS INTENTIONALLY DISTORTED THE RECORD TO PLACE PETITIONER IN A POOR LIGHT. IN DOING SO, RESPONDENT HAS DEMONSTRATED WHY SUMMARY JUDGMENT WAS INAPPROPRIATE.

Throughout its Brief in opposition to the Petition, Respondent has set forth false statements and false innuendos designed to place the Petitioner in a poor light and to distract this Court's attention from the significant, underlying legal issues. In doing so, Respondent has followed a consistent pattern, first begun before the district court and continued before the Court of Appeals. Largely as a result of this tactic, Petitioner has yet to have a plenary hearing in any forum.

Respondent characterizes Petitioner's legal argument as asserting that there is "necessarily an equivalency between evidence of a *prima facie* case and evidence of pretext." Respondent's Brief

at p.21. This is not the case. Rather, Petitioner has pointed out the need for this Court to clarify the following points: (1) that the standard for summary judgment after St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S. Ct. 2742 (1993) is no different from that required by Rule 56; (2) that summary judgment for the defendant should *rarely* be granted once a *prima facie* case has been established; and (3) that, for the purpose of resisting a motion for summary judgment, evidence in support of the qualifications prong of the *prima facie* test and evidence of pretext may be identical.

The Respondent now argues that courts court should refrain from substituting their judgment for that of an academic institution when determining questions of appointment, renewal, promotion, and

tenure.[1] But the issue at this stage of the proceeding is not whether the reasons proffered by the institution are adequate; the issue is whether the reasons are true or merely a pretext for discrimination.[2] On the record here, and on the record in many similar cases in which evidence in support of pretext and in support of a *prima facie* case are presented together, a resolution of factual disputes on a summary judgment motion is improper.

In its Summary of Argument, Respondent asserts the following:

> If, after a defendant articulates legitimate, non-discriminatory reasons for a challenged employment action, the plaintiff does not produce evidence from which a fact-finder may

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[1] However, Respondent's counsel repeatedly substitutes his judgment for that of the University. See, pp. 6-15, infra.

[2] As pointed out in the Petition, reappointment was not a contest. Each applicant was to be judged by the stated criteria, and all could be reappointed.

> reasonably infer pretext, summary judgment should be granted to the defendant.

Respondent's Brief at p.18. However, a judge determining a motion for summary judgment is not a fact-finder, and this Court has recognized the possibility that a defendant will articulate so-called legitimate reasons that are, in reality, disingenuous.

Section IV of Justice Scalia's opinion in Hicks discusses extensively the consequences of an employer proffering false reasons, and it concludes, in part, that false testimony may entitle the defendant to a trial. But, of even greater importance, false testimony by a defendant should not deprive a plaintiff of a trial, once that plaintiff has proved a *prima facie* case.

Put differently, Justice Scalia's opinion took pains to allay fears that

false testimony by an employer would be rewarded. But unless the issue raised by the Petitioner is clarified, arguments such as that advanced by the Respondent will prevail, and Hicks will have produced exactly the result which Justice Scalia sought to eliminate.

The problem, of course, is that the district court repeatedly resolved credibility disputes and contested issues of material fact, in violation of Rule 56's well established standards, and it did so largely on the basis of self-serving Affidavits submitted by Rutgers' officials, often after the same officials had been deposed. Nothing demonstrates more clearly the inappropriateness of summary judgment in this case than the clear divergence between the facts set forth by the Petitioner and those set forth by the Respondent. Fortunately, it

is sometimes possible to anchor these various contentions in reality, and, when that occurs, Respondent's overall design is apparent.

Some of the more glaring examples are the following:

- At page 12 of Respondent's Brief, it is asserted that Dean Hosford recalled that Petitioner had complained about the quality of her students, citing Pa102, the district court's decision. A review of the Appendix and of the decision reveals no such reference.

- Similarly, at page 6 of its brief, Respondent cites Pa30, the district court's decision, to state that Petitioner had "ever-changing and conflicting research goals with meager results." The district court said no such thing in the entire opinion.

- Contrary to Respondent's

assertions at pages 3-5, Petitioner was well qualified for her position. Dean Kaish's recommendation regarding Petitioner's hiring, as reflected in his extensive statement in the record, was not at all ambivalent. It strongly endorsed Petitioner's qualifications, including her background in organizational behavior, as appropriate to a business program and cited the positive recommendations of others and the approval of her hiring by David Blake, Dean of the Graduate School of Management.

- At page 4 of its Brief, Respondent characterizes Petitioner's post-doctoral studies at New York University as a "course." In fact, it was a business curriculum.

- At page 4 of its Brief, Respondent falsely states that Petitioner "suggests" that her post-doctoral studies at N.Y.U.

were in her doctoral field. She asserted the opposite. Petition at page 6.

○ At page 4 and footnote 4 of its Brief, Respondent (and Dean Hosford) also ignore documents submitted at the time of Petitioner's application that showed that she had two major doctoral fields: higher education and social and organizational psychology, and that her research dealt with the management of institutions of higher education. Petitioner's resume showed that she had extensive experience in these fields.

○ Salary data demonstrated that Petitioner's starting salary was lower than any other newly hired faculty member on tenure track in 1985 in all business units on any campus at Rutgers, including those without Ph.D.'s, and lower than any tenure track faculty hired in 1985 at the Faculty of Arts and Sciences--Newark.

○ Respondent's Brief relies upon Petitioner's 1985 and 1986 performance reviews. These were not submitted by Petitioner as part of her reappointment packet, were not considered by the department committee, and, under the Rules established by Rutgers, could not have been considered.

○ At page 7, Respondent quotes from then Department Chair Rosenberg's 1986 performance review, stating: "As she [Fisher] shifts her emphasis more into Mgt. Studies, her goals should become more focused in business areas." However, Respondent intentionally omitted the preceding sentence of that review, which stated "Her goals are realistic and most have been met ore are in progress . . ." and the final sentence, which stated "Her energy level and commitment are impressive."

○ At page 10 of its brief, Respondent criticizes Petitioner for having only one published refereed article. She had two published articles (and an abstract published in the Academy of Management Proceedings). Respondent ignores Petitioner's notification of the publication of her second article in her reappointment packet. Petitioner fails to mention that some successful candidates had none.

○ Also at pages 6 and 13-14, in an effort to minimize Petitioner's post-hire research, Respondent refers to an article which it asserts was accepted for publication before Petitioner was hired and published in 1985. Both facts are wrong. The article was accepted after Petitioner was hired and had begun her appointment and, after revisions, was published in the 1985 volume in March of

1986, while Petitioner was teaching at Rutgers.

○ Respondent repeatedly asserts that Petitioner's research was not in the field of management; it was.

○ While minimizing the value of Petitioner's pre-hire research, Respondent, at page 15, cites Professor Castelino's pre-hire research as a point in his favor. Castelino, a younger male, received his Ph.D. three years before Petitioner and had held a four year prior appointment as assistant professor of finance.

○ Contrary to the impression which Respondent hopes to create, there was no University standard which required that Petitioner publish in management journals for reappointment, even though she did so.

○ At pages 10 and 11, Respondent has taken Petitioner's comments on her

publications out of context. Petitioner never said that the journal in which she published was not management oriented. Respondent quotes out of context from Petitioner's Research Statement in her packet. In fact, Petitioner was also pursuing management research in other areas, such as collective bargaining, but completion of this research and its publication was not required for reappointment.

○ Respondent's assertion that Petitioner was not reappointed because her research accomplishments were "clearly below average" in both quantity and quality is clearly pretext. During 1987 and 1988, both FASN and the Graduate School of Management reappointed some assistant professors who had no publications whatsoever. A detailed list of those reappointed with fewer

publications, or with none, was ignored by the district court.

○ While a University may be legitimately concerned about recruitment, this is not among the five criteria set forth for reappointment in the Respondent's Promotion Instructions.

○ Despite Respondent's contention at page 15, footnote 12 that identical procedures were followed with respect to Petitioner and Castelino, they were not. The Dean failed to complete the required rating form for Castelino and for the other successful candidates. He did so only for Petitioner and for the only other non-reappointed candidate, who was also an older woman.

○ Even if the same procedures were followed for Petitioner and Castelino, they had a different impact. Professor Blake, the tenured faculty member who was

not notified to attend the department committee meeting, was the only person available in Petitioner's field. In contrast, the then department chair, who had directly helped Castelino with his work, was present and, contrary to the Promotion Instructions, voted with the department.

- Respondent repeatedly points out that Castelino had articles on review. This is no assurance of their publication or of their quality. In fact, Respondent made no assessment of the quality of Castelino's work. Yet it claimed that Petitioner's work was of poor quality with no evidence and ignored evidence to the contrary.

- Respondent's statement, in footnote 14, that Research Council Grants for new faculty are "commonly granted" is false and contradicted by the record.

These grants were competitive among all new faculty and were not "commonly granted."

○ Contrary to the impression that Respondent creates in footnote 14, Petitioner did receive a second Research Council Grant. Her second grant was competitive among all University faculty. Castelino did not receive this grant.

○ Although Respondent refers to Castelino's works in progress, submission of such works was not required by the promotion instructions and was not requested by department chair Venezian.

○ Respondent has ignored completely the statistical report of Dr. Ashenfelter, which shows that Respondent had a clear bias towards younger male candidates that was generally statistically significant.

There is nothing about the nature of a discrimination case which mandates or even

suggests that evidence of a *prima facie* case and evidence of pretext must be separate and distinct from each other. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-255. Here, as in other cases of employment discrimination "[t]he issue of the defendant's intent at the time of the plaintiff's discharge is clearly a factual question." Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir. 1987).

The Hicks analysis leaves in doubt the nature and extent of analysis of evidence to be conducted by a Court on a motion for summary judgment. Because this is an ambiguous issue, and because the instant case is so drastically affected by the nature of the analysis, the Petition should be granted.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the initial petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Lawrence S. Schwartz*
Stephen J. Edelstein
SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
293 Eisenhower Parkway
Suite 300
Livingston, NJ 07039
(201) 740-1600
Attorneys for Petitioner

*Counsel of Record